

No. 15726

United States
Court of Appeals
for the Ninth Circuit

ALBERT J. FIHE and ELIZABETH FIHE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK

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The Tax Court of the United States

Docket No. 52394

ALBERT J. FIHE,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Regional Commissioner of Internal Revenue in his notice of deficiency dated January 14, 1954, the first paragraph of which states as follows:

“You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946, discloses a deficiency of \$9,515.06 and penalty of \$475.75, as shown in the attached statement.”

And as a basis of his proceedings, alleges as follows:—

I.

The petitioner is an individual, is married and resides with his wife at 1671 Casale Road, Pacific Palisades, California, and that the above address is his residence. The return for the period here involved was filed with the Collector of Internal Revenue in Chicago, Illinois.

II.

The notice of deficiency, a copy of which is at-

tached and marked "Exhibit A", was mailed to the petitioner on January 14, 1954.

III.

The determination of tax for the year 1946 set forth on the said notice of deficiency is erroneous, for the following reasons:—

(a) The Commissioner erred in finding a net income for the year 1946 instead of a loss and erred in reversing the petitioner's claim for a refund of \$1,633.56.

(b) The Commissioner erred in increasing my distributive share of income from the partnership known as Holly Molding Devices, Inc., of Chicago, Illinois, in the amount of \$13,663.34, and in holding that my wife, Elizabeth M. Fihe was not a bona fide member of said partnership during the year 1946. However, I hereby declare that there was a true partnership from the beginning of the organization, that we both invested considerable sums of money, totalling more than \$35,000.00, in Holly Molding Devices, a partnership of Chicago, Illinois, during the period from 1938 to 1946 inclusive. My wife assisted in organizing the partnership, contributed money to its organization and in its subsequent development, worked at the offices of the partnership assisting in the keeping of books and records, signing of checks, taking part in conferences relating to the conduct of the business and attended sales meetings, displays and shows advertising the products of the company in

many cities throughout the country. At these shows and conventions, she distributed literature, talked to prospective customers, assisted in explaining the construction and operation of the machines, took orders, saw that the orders were filled and in general, performed the duties of an active and bona fide partner in the business. She can therefore qualify better, in all respects, as an active bona fide partner than Agnes Holly, the wife of Harry H. Holly who was also a partner, but who contributed no money whatsoever and worked at the offices of the company only during the time that her husband was serving a sentence in the Federal Penitentiary for income tax fraud, which fraud was discovered and voluntarily reported by me to the Collector of Internal Revenue immediately after its inception, and I assisted internal revenue agents and the Federal Bureau of Investigation in trapping said Harry H. Holly, an internal revenue agent and the accountant for the company in a conspiracy to defraud the United States Government of considerable sums of income taxes for the years 1944, 1945 and 1946.

(c) The Commissioner erred in disallowing deductions in the amount of \$5,015.58 for alleged overstated legal expense and a loss from operation of the Los Angeles office.

There is a mention in this allegation of unauthorized deduction of \$1,000.00 included in legal expense and stated as paid to deceased partner's wife. So far as petitioner is advised, none of the

members of the original partnership are deceased, so this is obviously in error.

(d) There is no basis for transferring the personal exemption credit as originally claimed by my wife and myself in our separate returns.

(e) Protest is made against the recommendation of a penalty for negligence. My records are perfectly intelligible, absolutely accurate, readily understandable, and the fact that certain of these records were lost in the transfer of all my business and my residence belongings from Illinois to California is obviously not my fault.

Wherefore, petitioner prays that this court may hear this proceeding and determine that there is no deficiency in petitioner's income tax liability for the year 1946.

/s/ ALBERT J. FIHE,

Pro se and Attorney.

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department—Office of the Regional
Commissioner, Internal Revenue Service, 1250
Subway Terminal Building, 417 South Hill
Street, Los Angeles 13, California.

In Replying Refer to: ARC-Ap:SF — LA:COP:
RR — 90-D.

Mr. Albert J. Fihe
1023 Victory Place,
Burbank, California.

January 14, 1954

Dear Mr. Fihe:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946 discloses a deficiency of \$9,515.06 and penalty of \$475.75, as shown in the attached statement.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency and penalty mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and penalty and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue,

By W. T. TIGNER,

Associate Chief, Appellate Div.

Enclosures:

Statement

Form 1276

Agreement Form

STATEMENT

Mr. Albert J. Fihe

1023 Victory Place, Burbank, California

Tax Liability for the Taxable Year Ended December 31, 1946:

Year	Deficiency	5% Penalty
1946—Income tax	\$9,515.06	\$475.75

In making this determination of your income tax and penalty liabilities careful consideration has been given to the report of examination dated January 3, 1951, to your protest dated January 24, 1951 and to conferences held on various dates from May 16, 1951 to September 1, 1953.

The 5% negligence penalty is asserted under the provisions of section 293(a) of the Internal Revenue Code.

ADJUSTMENTS TO NET INCOME

Year 1946

Net income disclosed by original return.....	\$ 2,508.32
Add: Additional income reported on amended return....	5,994.32
<hr/>	
Net income per amended return.....	\$ 8,502.64
Deduct: Tentative net operating loss deduction (carry-back from year 1948).....	8,502.64
<hr/>	
Net income previously determined.....	\$ 0.00
Unallowable deductions and additional income:	
(a) Net operating loss deduction	
disallowed	\$ 8,502.64
(b) Partnership income—transferred	
from wife's return.....	13,663.34
(c) Business income increased.....	5,015.58
<hr/>	
	27,181.56
<hr/>	
Net income as adjusted.....	\$27,181.56

EXPLANATION OF ADJUSTMENTS

(a) Tentative net operating loss deduction (carry-back from the year 1948) is restored to income since, upon examination, there is disclosed net income for the taxable year 1948 rather than a net loss of \$27,122.41 shown on the joint 1948 return. (Tentative refund of \$1,633.56 income tax allowed is, therefore, reversed.)

(b) Your distributive share of income from the partnership Holly Molding Devices, Chicago, Illinois, for the taxable year January 1, 1946 to September 30, 1946, date of dissolution, is increased as follows:

Your corrected share of distributive income from
the partnership \$27,326.69

Less:

Amount reported on original return.... \$5,940.61

Amount reported on amended return

 filed 7-7-1947 7,722.74 13,663.35

(1) Adjustment—increase \$13,663.34

(1) The amount of \$13,663.34 was reported on the amended return of your wife, Mrs. Elizabeth M. Fihe, as her distributive share of partnership income.

Explanation of Adjustments—(Continued)

It is held that your wife, Mrs. Elizabeth M. Fihe, was not a bona fide member of said partnership during the taxable year 1946. Accordingly, the portion of partnership income reported on her amended 1946 return in the amount of \$13,633.34 is included as a part of your distributive share of partnership income.

(c) The understatement of business income in your 1946 return is determined as follows:

(1) Deduction for legal expenses overstated.....	\$1,000.00
(2) Deduction for traveling expense overstated.....	1,537.47
(3) Unreported income—Los Angeles office.....	749.69
	<hr/>
Total	\$3,287.16
(4) Loss, Los Angeles office, claimed on amended return disallowed	1,728.42
	<hr/>
Adjustment—increase in business income.....	\$5,015.58

(1) The item of \$1,000.00 (included in \$5,720.30 legal expense claimed) for payment to deceased partner's wife is not an allowable deduction.

(2) The amount of \$1,537.47 (included in traveling expense of \$4,763.77 claimed) is disallowed as representing personal items.

(3) and (4) There is disclosed net income of \$749.69 from the operation of your Los Angeles office instead of a loss of \$1,728.42 claimed on the amended return.

(d) Personal exemption credit for three dependents is transferred to your return from the return of your wife. The total credit allowed is, therefore, \$2,000.00 in lieu of \$500.00 claimed on your return.

COMPUTATION OF TAX

Year 1946

Net income	\$27,181.56
Less: (d) Exemptions (4).....	2,000.00
	<hr/>
Balance subject to tax.....	\$25,181.56
Tentative tax	\$10,257.12
Less: 5% reduction.....	512.86
	<hr/>
Income tax liability.....	\$ 9,744.26

Computation of Tax—(Continued)

Income tax disclosed by return:

Original, Account No. 2085379

Chicago District \$ 399.68

Amended return, 4-300828-1948..... 1,463.08

Total \$1,862.76

Less: Tentative allowance IT-CB-23947..... 1,633.56 229.20

Deficiency of income tax..... \$ 9,515.06

5% negligence penalty..... \$ 475.75

[Endorsed]: T.C.U.S. Filed April 8, 1954.

The Tax Court of the United States

Docket No. 52396

ALBERT J. FIHE and ELIZABETH M. FIHE,
Husband and Wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Regional Commissioner of Internal Revenue in his notice of deficiency dated January 14, 1954, the first paragraph of which states as follows:

“You are advised that the determination of your income tax liabilities for the taxable years ended December 31, 1947, and December 31, 1948, discloses a deficiency of \$7,324.10 and penalty of \$880.12, as shown in the attached

statement.” (No mention was made of the year 1949, but the determination included a resume of that year.)

And as a basis of their proceedings, allege as follows:

I.

The petitioners are individuals, are married and are living together, both residing at 1671 Casale Road, Pacific Palisades, California, and that the above address is their joint residence. The return for the year 1947 was filed with the Collector of Internal Revenue in Chicago, Illinois, and the returns for the years 1948 and 1949 were filed with the Collector of Internal Revenue in Los Angeles, California.

II.

The notice of deficiency, a copy of which is attached hereto and marked “Exhibit A”, was mailed to the petitioners on January 14, 1954.

III.

For the Year 1947

The determination of tax for the year 1947 set forth on the said notice of deficiency is erroneous.

The Commissioner, in recalculating our return, increased our net income for the year by the sum of \$893.50. This was in error, as follows:—

(a) We did not receive taxable or any other dividends from Holly Molding Devices, Inc., of Chicago, Illinois, during the year 1947, in the amount of \$8,890.00 or in any other amount.

(b) We did not receive royalties of \$1,166.57 in

the year 1947 from Holly Molding Devices, Inc. All royalties received were fully reported, and were from Milprint, Inc., of Milwaukee, Wisconsin.

(c) Disallowance of contributions in the amount of \$92.00 is arbitrary.

(d) Disallowance of \$6,283.38 as taxes paid in the year 1947 is erroneous.

(e) Disallowance of medical expenses deduction of \$19.17 is arbitrary, capricious, unrealistic, contrary to the actual facts, and is a good illustration of the attitude of various examiners in this matter.

(f) The mathematical error of \$64.09 in totalling our listed deductions is admitted without prejudice to any claim for deductions in this corrected total.

(g) The correction of the capital loss on Rio Grande Copper Co. stock is admitted.

(h) The Commissioner's computation of a claimed loss in business income is incorrect in that all legal expenses deducted were properly substantiated, also travelling expenses and advertising expenses were properly substantiated. The gross receipts were not understated in the amount of \$943.22.

(i) The credit for three dependents instead of two is admitted.

(j) Petitioners further allege that Elizabeth M. Fihe was an actual partner in the firm known as Holly Molding Devices of Chicago before the same was incorporated. The findings of various agents and other reviewing officers have all been to the effect that no true partnership existed. However, your petitioners hereby declare that there was a true partnership from the beginning of the organi-

zation, that they both invested considerable sums of money, totalling more than \$35,000.00, in Holly Molding Devices, a partnership of Chicago, Illinois, during the period from 1938 to 1946 inclusive. Elizabeth M. Fihe assisted in organizing the partnership, contributed money to its organization and in its subsequent development, worked at the offices of the partnership assisting in the keeping of books and records, signing of checks, taking part in conferences relating to the conduct of the business and attended sales meetings, displays and shows advertising the products of the company in many cities throughout the country. At these shows and conventions, she distributed literature, talked to prospective customers, assisted in explaining the construction and operation of the machines, took orders, saw that the orders were filled and in general, performed the duties of an active and bona fide partner in the business. She can therefore qualify better, in all respects, as an active bona fide partner than Agnes Holly, the wife of Harry H. Holly who was also a partner, but who contributed no money whatsoever and worked at the offices of the company only during the time that her husband was serving a sentence in the Federal Penitentiary for income tax fraud, which fraud was discovered and voluntarily reported to the Collector of Internal Revenue in Chicago immediately after its inception, by Albert J. Fihe, who assisted internal revenue agents and the Federal Bureau of Investigation in trapping said Harry H. Holly, an internal revenue agent and the

accountant for the company in a conspiracy to defraud the United States Government of considerable sums of income taxes for the years 1944, 1945 and 1946.

(k) Petitioners further aver that any and all penalties arbitrarily assessed against them during the progress of the above determinations were unfair, unfounded and are null and void.

IV.

For the Year 1948

The determination of tax for the year 1948 set forth on the said notice of deficiency is erroneous, as follows:—

(a) The salary income received by Albert J. Fihe from Holly Molding Devices, Inc., for the year 1948 was not understated in the sum of \$861.90 or in any other sum.

(b) The disallowance of sundry amounts as unsubstantiated, under the headings of Interest, Taxes, Losses, Freight expense, Legal expense, Stationery, Travelling expense, Commissions, Advertising, Repairs, Postage, Telephone and Depreciation is arbitrary, unreasonable and in absolute error.

(c) The disallowance of certain contributions reported by your petitioners is wrong.

(d) The Commissioner was in error when disallowing losses on sales of residences and furniture due to removal of business and residence from Illinois to California. The Commissioner erred in

computing the long term capital gain and the sale of stock of Holly Molding Devices, Inc. He erred in arbitrarily assuming that the cost of the stock was approximately \$20,000.00, when in fact it was over \$35,000.00. The examiner further arbitrarily assessed the entire receipt for the sale of our interest in Holly Molding Devices, Inc., onto the year 1948. We received approximately \$100,000.00 for the sale of our interests in said corporation, but only \$25,000.00 of this was paid in cash, the remainder being secured by a mortgage note on the corporation properties and payable in monthly instalments of \$1,750.00. We reported these sums as received in 1948 and succeeding years, and should not be taxed with the entire amount in a single year when the total was not collected until several years later. Furthermore, the mortgage notes deliberately omitted the words "or order" after our names as payees, thereby making these notes non-transferable. The fact that said notes were non-transferable and non-negotiable eliminates any possibility of a tax payment on the full amount of the sale until such time as the actual amounts of the notes had been collected by us. These non-negotiable promissory notes must be considered as having no fair market value.

(e) The casualty loss deduction of \$2,300.04 was fully substantiated. We were forced to file several suits against the parties responsible for the damage to our property. Some of these suits have not yet come to trial, and in the one that did, we obtained nothing.

(f) The disallowance of medical expenses is improper and arbitrary.

(g) The computation of the tax for the year 1948 is completely wrong as stated above, and the 5% negligence penalty is entirely unwarranted. There was no negligence.

V.

For the Year 1949

The calculation of an increase in business income for the year 1949 is erroneous, as follows:

(a) The Commissioner erred in arbitrarily disallowing deductions in the amount of \$10,873.60 under the headings of Repairs, Advertising, Legal expense, Travelling expense, Interest, Postage, Telecast, Bandmaster and Depreciation.

(b) The Commissioner erred in disallowing contributions in the amount of \$238.00, which amount was fully substantiated.

(c) The disallowance of interest deduction as a duplication is correct.

(d) The disallowance of taxes as a duplication is correct.

(e) The amount of \$21,000.00 representing deferred payments received from Holly Molding Devices, Inc., on sale of capital stock should not have been transferred back to 1948 income, but should have been considered as a long term capital gain in 1949 and handled as such.

VI.

Our claim for refund on account of carry back

losses was proper, is substantiated by our returns as filed, and protest is hereby made against any attempted disallowance of such refund or any attempt to make us return the same.

Wherefore, petitioners pray that this court may hear this proceeding and determine that there is no deficiency in petitioners' income tax liability for the years 1947, 1948 and 1949.

Elizabeth M. Fihe hereby appoints Albert J. Fihe her attorney with full powers in the premises.

/s/ ELIZABETH M. FIHE,

/s/ ALBERT J. FIHE,

Pro se and Attorney.

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department, Office of the Regional
Commissioner, Internal Revenue Service, 1250
Subway Terminal Building, 417 South Hill
Street, Los Angeles 13, California.

In Replying Refer To: ARC-Ap:SF LA:COP:RR
90-D.

January 14, 1954.

Mr. Albert J. Fihe and
Mrs. Elizabeth M. Fihe,
Husband and Wife,
1023 Victory Place,
Burbank, California.

Dear Mr. & Mrs. Fihe:

You are advised that the determination of your

income tax liabilities for the taxable years ended December 31, 1947, and December 31, 1948, discloses a deficiency of \$7,324.10 and penalty of \$880.12, as shown in the attached statement.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency and penalty mentioned.

Within 90 days from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days, you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency and penalty and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue,

By W. T. TIGNER,

Associate Chief, Appellate Div.

Enclosures:

Statement

Form 1276

Agreement Form

STATEMENT

Mr. Albert J. Fihe and Mrs. Elizabeth M. Fihe, Husband and Wife
1023 Victory Place, Burbank, California
Tax Liability for the Taxable Years Ended
December 31, 1947 and December 31, 1948

Year	Deficiency	5% Penalty
1947—Income Tax.....	\$ 397.40	\$533.78
1948—Income Tax.....	6,926.70	346.34
Total	<u>\$7,324.10</u>	<u>\$880.12</u>

In making this determination of your income tax and penalty liabilities careful consideration has been given to the report of examination dated January 3, 1951, to your protest dated January 24, 1951, to conferences held on various dates from May 16, 1951 to September 1, 1953 and to your claim for refund of \$1,725.43 income tax for the taxable year 1947 filed on August 25, 1950.

Your claim is based upon the statement that "losses from the year 1949 more than offset the entire sum paid on the joint return for 1947." The amount of net operating loss deduction allowable has been determined herein, however, adjustment of other items disclose a deficiency in tax and your claim is therefore, not allowable.

If a petition to The Tax Court of the United States is filed against the deficiency shown herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by The Tax Court in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with internal revenue laws relating to the disallowance of claims.

The 5 per cent negligence penalty is asserted under the provisions of section 293(a) of the Internal Revenue Code.

ADJUSTMENTS TO NET INCOME

Year 1947

Net income disclosed by return.....		\$10,791.27
Unallowable deductions and additional income:		
(a) Dividends	\$ 8,890.00	
(b) Royalties	1,166.57	
(c) Contributions disallowed	92.00	
(d) Taxes disallowed	6,283.38	
(e) Medical expense disallowed.....	19.17	
(f) Mathematical error	64.09	16,515.21
		<hr/>
Total		\$27,306.48
Additional deductions		
(g) Capital loss	\$ 406.82	
(h) Business loss—net operating loss deduction	15,214.89	15,621.71
		<hr/>
Net income as adjusted.....		\$11,684.77

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that you received taxable dividends from Holly Molding Devices, Inc., during the year 1947 in the amount of \$8,890.00, which amount was not reported in your income tax return.

(b) It has been determined that you received royalties of \$1,166.57 in the year 1947, which amount was not reported in your income tax return.

(c) Deduction for contributions is reduced by \$92.00 (\$448.15 claimed on the return less \$356.15, amount substantiated).

(d) The deduction for taxes paid was overstated in your return for the year 1947 by the amount of \$6,283.38, determined as follows:

Amount claimed on return.....	\$7,680.88
Amount substantiated as taxes paid in the year.....	1,397.50
	<hr/>
Amount disallowed	\$6,283.38

(e) Medical expense deduction of \$19.17 claimed on the return is disallowed. The amount of \$1,028.27 medical expense paid shown on the return has not been substantiated.

Explanation of Adjustments—(Continued)

(f) Deductions listed on page 3 of your return amount to \$10,327.49 instead of \$10,391.58 claimed, indicating a mathematical error of \$64.09.

(g) Capital loss on Rio Grande Copper Co. stock is allowed as follows:

Cost, 1-26-1946		\$ 1,000.00
Liquidating dividend received.....		186.37
		<hr/>
Long-term capital loss.....	\$	813.63
50% loss recognized.....	\$	406.82
Amount claimed on return.....		0.00
		<hr/>
Capital loss deduction allowed.....	\$	406.82
(h) Business income (loss) reported on return.....		\$(3,151.10)
Increase:		
Deduction for legal expense		
disallowed as unsubstantiated.....	\$2,600.00	
Deduction of business traveling		
expense overstated	1,447.95	
Advertising expense overstated		
(personal items)	555.00	
Gross receipts understated.....	943.22	5,546.17
	<hr/>	<hr/>
Business income for the taxable year....		\$ 2,395.07
Less: Net operating loss deduction		
allowed (per Exhibit A, attached).....		20,761.06
		<hr/>
Business income (loss) as adjusted.....		\$(18,365.99)
Business loss claimed on return.....		(3,151.10)
		<hr/>
Adjustment—decrease in net income.....		\$ 15,214.89

(i) In the computation of tax, credit of \$1,500.00 is allowed for 3 exemptions (husband, wife and daughter) in lieu of the amount of \$1,000.00 claimed on the return.

COMPUTATION OF TAX

Year 1947

Net income	\$11,684.77
Less: (i) Exemptions—3.....	1,500.00
Balance subject to tax.....	<u>\$10,184.77</u>
Tentative tax	\$ 2,710.21
Less: 5% reduction.....	135.51
Income tax liability.....	<u>\$ 2,574.70</u>
Income tax disclosed by return: Original, Account No. 3006769, Chicago District.....	\$2,440.58
Less: Tentative allowance IT-CB 28826.....	263.28
	<u>2,177.30</u>
Deficiency of income tax.....	\$ 397.40
5% negligence penalty (as computed below).....	\$ 533.78

COMPUTATION OF PENALTY

Year 1947

Net income	\$11,684.77
Add: Net operating loss deduction.....	20,761.06
Net income before net operating loss deduction.....	<u>\$32,445.83</u>
Less: Exemption	1,500.00
Balance subject to tax.....	<u>\$32,945.83</u>
Tentative tax	\$13,806.41
Less: 5% reduction.....	690.32
Income tax liability before net operating loss carry- back from year 1949.....	<u>\$13,116.09</u>
Income tax liability reported on return.....	2,440.58
Deficiency of income tax for purpose of penalty com- putation	<u>\$10,675.51</u>
5% negligence penalty.....	\$ 533.78

ADJUSTMENTS TO NET INCOME

Year 1948

Net income (loss) disclosed by return..... \$(27,122.41)

Unallowable deductions and additional income:

(a) Additional salary income.....	\$ 861.90	
(b) Business income	16,387.10	
(c) Contributions disallowed	373.23	
(d) Capital gain	34,507.75	
(e) Casualty loss	2,300.04	
(f) Medical expense	1,089.34	55,519.36

Net income as adjusted.....		\$ 28,396.95
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EXPLANATION OF ADJUSTMENTS

(a) It has been determined that the salary income reported in the return for the year 1948 as received from Holly Molding Devices, Inc., was understated in the sum of \$861.90, as shown below:

Amount received as shown by the	
corporate records	\$ 2,061.90
Amount reported in return.....	1,200.00

Additional salary income.....	\$ 861.90
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(b) It has been determined that net income from business was understated in the return for the year 1948 by the sum of \$16,387.10, due to the following adjustments:

Deductions disallowed:

Interest (unsubstantiated)	\$ 235.40
Taxes (unsubstantiated)	511.29
Losses (unsubstantiated)	3,362.44
Freight expense (personal items).....	1,124.45
Legal expense (unsubstantiated).....	561.75
Stationery (unsubstantiated)	150.00
Traveling expense (personal items).....	5,802.97
Commissions (personal items).....	800.00
Advertising (personal expense).....	598.14
Repairs (duplication)	74.57
Postage (duplication)	243.33
Telephone (duplication)	71.53
(1) Depreciation	1,986.58

Total Deductions disallowed.....	\$ 15,522.45
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Explanation of Adjustments—(Continued)

Add: Error in addition of deductions on return

(Correct total \$52,864.27 in lieu of \$53,448.47

shown on the return)..... 584.20

Unreported receipts 280.45

Adjustment—increase in business income..... \$ 16,387.10

Business income (loss) shown on return..... \$(33,363.88)

Increase from above..... 16,387.10

Business income (loss) as adjusted..... \$(16,976.78)

(1) Depreciation deduction is disallowed in the amount of \$1,-986.58, as shown below:

	Basis	%	Depreciation
Machinery	\$10,270.58	10%	\$ 1,027.06
Building	17,000.00	3%	510.00
Total			\$ 1,537.06
Depreciation allowed for 6 months.....			\$ 768.53
Amount claimed on return.....			2,755.11
Depreciation disallowed			\$ 1,986.58

(c) Deduction for contributions is reduced by \$373.23 (\$664.48 claimed on the return less \$291.25, amount substantiated).

(d) You reported net capital gain of \$5,194.56 on your return, as follows:

"Sale of Holly Molding Devices.....	Gain	\$ 13,875.64
Sale of Apt. & Furniture.....	Loss	1,130.48
Sale of House & Furniture.....	Loss	18,550.60
Net gain		5,194.56"

Losses on sales of personal residences and personal furniture are not allowable deductions for income tax purposes.

Long-term capital gain on the sale of capital stock of Holly Molding Devices, Inc., is computed as follows:

Selling price	\$100,000.00
Cost basis of stock.....	20,595.37
Long-term capital gain.....	\$ 79,404.63

Explanation of Adjustments—(Continued)

Gain recognized—50% (section 117, Internal Revenue Code).....	\$ 39,702.31
Total capital gain as adjusted.....	<u>\$ 39,702.31</u>
Amount reported on return.....	5,194.56
Adjustment—increase in capital gain.....	<u>\$ 34,507.75</u>

(e) The casualty loss deduction in the 1948 return in the amount of \$2,300.04 has not been substantiated as an allowable deduction from gross income under the provisions of section 23 of the Internal Revenue Code.

(f) Deduction for medical expense is disallowed, as shown below:

Medical expense deduction claimed on return.....	\$ 1,089.34
Medical expense paid—amount substantiated.....	\$ 735.79
Adjusted gross income as revised.....	\$29,162.99
5% of adjusted gross income.....	1,458.15
Excess	None
Medical expenses allowable.....	\$ 0.00
Amount claimed	1,089.34
Medical expense disallowed.....	<u>\$ 1,089.34</u>

COMPUTATION OF TAX

Year 1948

	Alternative Tax	Tax at Ord- inary Rates
Net income	\$28,396.95	\$28,396.95
Less: Exemptions—3.....	1,800.00	1,800.00
Income subject to tax—joint.....	<u>\$26,596.95</u>	<u>\$26,596.95</u>
1/2 thereof	\$13,298.48	\$13,298.48
Less: Long-term capital gain.. \$39,702.31		
1/2 thereof	19,851.15	19,851.15
Ordinary income	<u>\$ 0.00</u>	<u>\$13,298.48</u>
Tentative tax	\$ 0.00	\$ 3,958.35

Computation of Tax—(Continued)

	Alternative Tax	Tax at Ordinary Rates
Less % reduction:		
\$ 400.00 at 17%.....	\$ 68.00	
3,558.35 at 12%.....	427.00	495.00
Partial tax	\$ 0.00	
Add: 50% of \$19,851.15.....	9,925.58	
Alternative tax—single computation.....	\$ 9,925.58	
Alternative tax—joint (not applicable)....	\$19,851.16	
Tax at ordinary rates—single computation.....		\$ 3,463.35
Tax at ordinary rates—joint (lesser tax).....		\$ 6,926.70
Income tax liability.....		\$ 6,926.70
Income tax disclosed by return:		
Original, Account No. 9143618, Los Angeles District		0.00
Deficiency of income tax.....		\$ 6,926.70
5% negligence penalty.....		\$ 346.34

EXHIBIT "A"

NET OPERATING LOSS DEDUCTION FOR YEAR 1947

Net loss for year 1949 (as shown below).....	\$20,884.54
Addition under section 122 (d) I.R.C.:	
Long-term capital gain taken into account 100%—	
Amount included in income, \$123.48—Balance.....	123.48
Net operating loss deduction—for year 1947.....	\$20,761.06

Year 1949

ADJUSTMENTS TO NET INCOME

Net income (loss) disclosed by return.....	\$(18,146.31)
Increase:	
(a) Business income	\$10,602.38
(b) Contributions	238.00
(c) Interest	3,909.95
(d) Taxes	3,511.44
	18,261.77
Total	\$ 115.46
Decrease:	
(e) Payments reported from corporation.....	21,000.00
Net income (loss) as adjusted.....	\$(20,884.54)

EXPLANATION OF ADJUSTMENTS

(a) Business income reported on the 1949 return is increased by \$10,602.38, due to the following adjustments:

Deductions disallowed:

Repairs (personal items \$1,906.02 and personal auto repairs \$204.00).....	\$ 2,110.02
Advertising (personal items \$884.57 and duplication \$1,797.09)	2,681.66
Legal expense (duplication).....	247.40
Traveling expense (personal items \$1,752.99 and duplication \$230.18)	1,983.17
Interest expense (personal item).....	601.06
Postage expense (personal item).....	249.00
Telecast expense (duplication).....	1,661.62
Bandmaster (duplication)	632.50
(1) Depreciation	707.17
Total deductions disallowed.....	\$10,873.60
Receipts understated	628.78
Total	\$11,502.38
Less: Mathematical errors.....	900.00
Net increase in business income.....	\$10,602.38

(1) Depreciation is adjusted as follows:

	Basis	%	Allowed	Claimed on Return
Machinery—	\$10,270.58	10%	\$1,027.06)	
1949 Additions	5,223.43	10%	6 mo. 261.17)	\$1,550.40
Building—	17,000.00	3%	510.00)	
1949 Additions	3,000.00	3%	6 mo. 45.00)	1,000.00
Total			\$1,843.23	\$2,550.40
				1,843.23

Depreciation disallowed \$ 707.17

(b) Deduction for contributions is disallowed in the amount of \$238.00 (\$285.51 claimed on return less \$47.51, amount substantiated).

(c) Interest deduction of \$3,909.95 is disallowed as a duplication. The amount was also claimed as a business expense.

Explanation of Adjustments—Continued)

(d) Deduction for taxes is disallowed as a duplication. The amount was also claimed as a business expense.

(e) The amount of \$21,000.00 representing payment received from Holly Molding Devices, Inc., is eliminated from income. The amount is included in 1948 income in the computation of capital gain from sale of patent interests, etc. to Holly Molding Devices, Inc.

[Endorsed]: T.C.U.S. Filed April 8, 1954.

[Title of Tax Court and Docket No. 52394.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I.

For lack of sufficient information, denies that the petitioner resides at 1671 Casale Road, Pacific Palisades, California; admits the remaining allegations contained in paragraph I of the petition.

II.

Admits the allegations contained in paragraph II of the petition.

III.

Denies the allegations of error contained in paragraph III of the petition, and all subparagraphs thereof.

IV.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ DANIEL A. TAYLOR, REM,
Chief Counsel, Internal Revenue
Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
E. C. Crouter, Assistant Regional Counsel;
R. E. Maiden, Jr., Special Assistant to the Regional Counsel; John J. Burke, Special Attorney; Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed May 17, 1954.

[Title of Tax Court and Docket No. 52396.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits and denies as follows:

I.

For lack of sufficient information, denies that the petitioners reside at 1671 Casale Road, Pacific Palisades, California; admits the remaining allegations contained in paragraph I of the petition.

II.

Admits the allegations contained in paragraph II of the petition.

III.

Denies the allegations of error contained in paragraph III of the petition, and all subparagraphs thereof.

IV.

Denies the allegations of error contained in paragraph IV of the petition, and all subparagraphs thereof.

V.

Denies the allegations of error contained in paragraph V of the petition, and all subparagraphs thereof.

VI.

Denies the allegations contained in paragraph VI of the petition.

VII.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ DANIEL A. TAYLOR, REM,
Chief Counsel, Internal Revenue
Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
E. C. Crouter, Assistant Regional Counsel;
R. E. Maiden, Jr., Special Assistant to the Regional Counsel; John J. Burke, Special Attorney; Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed May 17, 1954.

[Title of Tax Court and Docket No. 52396.]

AMENDMENT TO ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for further answer to the petition in the above-entitled proceeding, alleges as follows:

VIII.

In 1948 petitioners sold their capital stock, certain patent rights and all their interests in certain land and buildings to the Holly Molding Devices, Inc. Respondent determined that this sale was a completed sale in 1948 and that the gain therefrom should be reported in 1948 as long term capital gain. Petitioners reported a portion of this gain in 1948 and another portion in 1949. Respondent, following his determination that the sale was completed in 1948, eliminated from the petitioners' income of 1949 the portion of the gain from the sale which they had reported in 1949. This elimination from 1949 income resulted in a net operating loss for such year which was carried back to 1947, as set forth in the notice of deficiency.

Petitioners contend they are entitled to report the gain from such sale on the installment method or the deferred payment method. If the Court should uphold petitioners' contention that they are entitled to report the sale on the installment or deferred payment method, then a portion of the gain should be reported in 1949, and the net operating loss

carry-back to 1947 should be reduced or eliminated. This will result in an increased deficiency for 1947, claim for which is hereby asserted pursuant to section 6214(a) of the Internal Revenue Code of 1954.

Wherefore, it is prayed:

1. That the petitioners' appeal be denied and that the respondent's determination be approved.

2. In the alternative, if this Court should find and hold that petitioners are entitled to report the gain from the sale on the installment or deferred payment method, that the net operating loss carry-back from 1949 to 1947 be reduced or eliminated with a corresponding increased deficiency for 1947, claim for which has been asserted herein.

/s/ JOHN POTTS BARNES, REM,
Chief Counsel, Internal Revenue
Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
E. C. Crouter, Assistant Regional Counsel;
R. E. Maiden, Jr., Special Assistant to the Regional Counsel; Mark Townsend, Attorney;
Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Nov. 28, 1955.

[Title of Tax Court and Docket No. 52394.]

COMPUTATION FOR ENTRY OF DECISION

The attached computation reflecting a deficiency in income tax and 5% negligence penalty in the re-

spective amounts of \$2,826.87 and \$141.34 for the taxable year 1946, is submitted on behalf of the respondent in compliance with the opinion of the Court determining the issues in this proceeding.

The computation is submitted without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court pursuant to the statute in such cases made and provided.

/s/ JOHN POTTS BARNES, ECC.,
Chief Counsel, Internal Revenue
Service.

Of Counsel:

Melvin L. Sears, Regional Counsel, E. C. Crouter, Assistant Regional Counsel, R. E. Maiden, Jr., Special Assistant to the Regional Counsel, Mark Townsend, Attorney, Internal Revenue Service.

RECOMPUTATION STATEMENT

In re: Albert J. Fihe, 1671 Casale Road, Pacific Palisades, California.

Docket No. 52394

Year	Deficiency	5% Penalty (Negligence)
1946-Income Tax	\$2,826.87	\$141.34

The recomputation of tax liability and penalty shown herein reflects the opinion of The Tax Court of the United States filed June 12, 1956. The decision of The Tax Court will be entered under Tax Court Rule 50.

The 5% addition to tax under section 293(a) of the Internal Revenue Code of 1939, for negligence penalty was sustained by The Tax Court.

ADJUSTMENT TO NET INCOME

Year 1946

Net income per deficiency notice dated 1/14/1954	\$27,181.56
Decrease:	
(a) Partnership income transferred to return of wife	13,663.34
Net income as adjusted.....	\$13,518.22

EXPLANATION OF ADJUSTMENT

(a) It has been stipulated that the petitioner's wife, Elizabeth M. Fihe, was a bona fide partner in the partnership Holly Molding Devices in the year 1946. The wife's share of partnership income, \$13,663.34, included in income in the deficiency notice is, therefore, eliminated.

COMPUTATION OF TAX

Year 1946

Net income	\$13,518.22
Less: Exemptions (4).....	2,000.00
Balance subject to tax	\$11,518.22
Tentative tax	\$ 3,216.92
Less: 5% reduction	160.85
Income tax liability	\$ 3,056.07
Income tax disclosed by return:	
Original, Account No. 2085379, Chicago District	\$ 399.68
Amended return, 4-300828-1948 List....	1,463.08
Total	\$1,862.76
Less: Tentative allowance (IT-CB 23947)	1,633.56
Deficiency of income tax	\$ 2,826.87
5% Negligence penalty	\$ 141.34

Served and Entered Aug. 8, 1956.

[Endorsed]: T.C.U.S. Filed Aug. 6, 1956.

[Title of Tax Court and Docket No. 52396.]

COMPUTATION FOR ENTRY
OF DECISION

The attached computation is submitted, on behalf of the respondent, in compliance with the opinion of the Court determining the issues in this proceeding. Said computation provides that there are deficiencies in income tax and 5% negligence penalty as follows:

Year	Deficiency	5% Penalty (Negligence)
1947	\$ 397.40	\$533.78
1948	\$6,926.70	\$346.34

The computation is submitted without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court pursuant to the statute in such cases made and provided.

/s/ JOHN POTTS BARNES, ECC,
Chief Counsel, Internal Revenue
Service.

Of Counsel: Melvin L. Sears, Regional Counsel, E. C. Crouter, Assistant Regional Counsel, R. E. Maiden, Jr., Special Assistant to the Regional Counsel, Mark Townsend, Attorney, Internal Revenue Service.

RECOMPUTATION STATEMENT

In re: Albert J. Fihe and Elizabeth M. Fihe, 1671 Casale Road,
Pacific Palisades, California. Docket No. 52396.

Year	Deficiency	5% Penalty (Negligence)
1947	\$ 397.40	\$533.78
1948	6,926.70	346.34
Totals	<u>\$7,324.10</u>	<u>\$880.12</u>

The opinion of The Tax Court of the United States filed June 12, 1956 sustained the adjustment of tax and penalty liabilities shown in the deficiency notice dated January 14, 1954.

The deficiency and penalty shown above are the amounts shown in the deficiency notice.

Served and Entered Aug. 8, 1956.

[Endorsed]: T.C.U.S. Filed Aug. 6, 1956.

The Tax Court of the United States
Washington

Docket No. 52394

ALBERT J. FINE, Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 52396

ALBERT J. FIHE and ELIZABETH M. FIHE,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' PROPOSED FINDINGS

1. Elizabeth M. Fihe was a bona fide member of

the Illinois partnership known as Holly Molding Devices in Chicago during the year 1945 and up to October 1, 1946 when a corporation was formed.

2. Petitioners, Albert J. Fihe and Elizabeth M. Fihe, did, during the years 1936 to 1946 inclusive, jointly invest approximately \$50,000.00 in said partnership.

3. When petitioners sold their stock in the resultant corporation known as Holly Molding Devices, Inc. for \$100,000.00, the payments thereon comprised capital gain, which extended over almost four years, and should be taxed as such rather than all in the one year of 1948. Petitioners erroneously reported this profit as income, rather than capital gains thereby penalizing themselves.

4. Petitioners inadvertently neglected to claim a loss due to an unfortunate investment in a copper mine in the year 1947 and neglected to claim proper credit for dependents in that year.

5. Petitioner Albert J. Fihe did erroneously, but in good faith, twice deduct an item for interest paid in the year 1949, but this was due to the fact that there were two spaces for such interest deductions on the printed return for that year; and he did erroneously deduct the item of Federal Income Taxes paid during the year 1947.

6. Petitioners properly stated their income derived from Holly Molding Devices, Inc. in 1946 and 1947 and any evidence tending to establish addi-

tional income in the respective amounts of \$10,056.57 and \$861.90 is untrue.

7. Petitioners did not at any time under-state their business and other income for the years in question.

8. Petitioners' deductions for business contributions, traveling expenses, losses, etc., etc., during the years in question were all properly substantiated and should be allowed in full.

9. The records of Holly Molding Devices, Inc. submitted in connection with the Wisconsin deposition were all made up after the petitioners had sold all of their stock in the corporation and such revised records did not properly represent alleged disbursements made to the petitioners in the years in question.

10. Petitioner Albert J. Fihe received three weeks salary in the year 1948 from Holly Molding Devices, Inc. totalling \$1200.00, and no additional amounts whatever in the way of salary were paid to him in that year.

11. Petitioners kept accurate records of all their business transactions during 1946 through 1949, properly reported their income for those years, and should not be assessed any penalty for negligence.

12. Petitioner Albert J. Fihe saved the United States Government untold amounts in taxes which never would have been received, if he had not reported the attempted conspiracy between Harry H. Holly, the Internal Revenue Agent and the Com-

pany Auditor, which conspiracy was for the purpose of defrauding the Government.

April 5, 1956.

Respectfully submitted,

/s/ ALBERT J. FIHE,
Counsel for Petitioners.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket Nos. 52394, 52396.]

PETITIONERS' COMMENTS ON COMPUTATIONS SUBMITTED

1. Petitioners do not disagree with the computations submitted on behalf of Respondent relative to taxes for the year 1946, but they do disagree with the finding of negligence penalty for that year. There was no negligence, an amended return was submitted in good faith by the Petitioners, and the taxes, as determined by this amended return, were paid by the Petitioners at that time. The books of the Petitioners and the partnership were properly kept and audited for the year 1946. The auditing was by a firm of certified public accountants.

2. Petitioners do not disagree with the proposed recomputation of taxes for the year 1947, except as regarding the negligence penalty submitted by Counsel for Respondent as amounting to \$533.78. This is more than the actual tax deficiency, which is \$397.40. As with the year 1946, Petitioners' books

were properly kept and audited by the same firm of certified public accountants.

3. Petitioners disagree with the proposed recomputation of taxes for the year 1948.

According to Respondent's own Brief submitted in this case, Petitioners suffered a business loss of \$16,976.78 in the year 1948. Petitioners' return showed a business loss of \$33,363.88. Regardless of this, the recomputation by Counsel for Respondent indicates that Petitioners are deficient in their taxes for that year in the amount of \$6,926.70. This is obviously wrong. Counsel for Respondent also indicates that a negligence penalty should be assessed against Petitioners for the year 1948. The only negligence on the part of Petitioners for that year was a failure to make any money and, in fact, they suffered a great loss. There should be no taxes or penalties on a business loss. The loss itself is a more than sufficient penalty.

It is noted that the hearing on the computations as submitted is now set for 10:00 a.m. February 13, 1957, in The Tax Court of the United States in Washington, D. C. It is doubtful whether Counsel for Respondents can be in Washington on that date because of other previous commitments.

However, at the hearing on January 9, 1957, Honorable Judge Tietjens suggested that Counsel for Petitioners contact the local offices of the Regional Commissioner in Los Angeles with the view of possibly settling this entire controversy. Accord-

ingly, a copy of these Comments is being mailed to the offices of the Regional Commissioner, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California with a letter requesting a conference to this end.

Burbank, California, January 25, 1957.

Respectfully submitted,

/s/ ALBERT J. FIHE.

[Endorsed]: T.C.U.S. Filed Jan. 28, 1957.

[Title of Tax Court and Docket Nos. 52394, 52396.]

MOTIONS

To the Honorable Judges of The Tax Court of the
United States, Washington, D. C.

In order to place these matters in better condition for purposes of appeal, Petitioners submit the following:

I.

Petitioners contend that there should be no penalty for negligence assessed with regard to their 1946 returns.

As the record shows, Petitioners submitted individual tax returns as partners of Holly Molding Devices of Chicago. Later, an amended partnership return was submitted which was prepared by a firm of certified public accountants and corresponding amended returns were submitted by the Petitioners here.

There is absolutely no reason why a negligence penalty should be assessed against Petitioners under these circumstances.

II.

This Honorable Court, in its memorandum filed June 12, 1956, determined that Petitioners were liable for deficiency tax for the year 1948 in the amount of \$6,926.70, plus a five per cent penalty of \$346.34.

In this same memorandum, the Court determined that profits realized by Petitioners from the sale of their interests in Holly Molding Devices should all be taxed in one year, namely, 1948, even though Petitioners were paid in installments continuing through the next two or three years.

Petitioners did, for the year 1950, report as profit the sum of \$21,000.00 received from Holly Molding Devices as payment on installment notes for that year. According to the Court, this was wrong.

Deducting this apparent profit of \$21,000.00 in order to conform to the Court's ruling, it follows from Petitioners' 1950 return that they experienced a loss of \$22,100.73 in that year.

This loss should accordingly be allowed as a carry-back to apply on the tax assessed for the year 1948.

A copy of this document is today being mailed to the offices of the Regional Commissioner, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California.

Burbank, California, May 9, 1957.

Respectfully submitted.

ALBERT J. FIHE,
Counsel for Petitioners.

[Stamped]: Denied May 14, 1957. /s/ Norman
O. Tietjens, Judge.

Served and Entered May 17, 1957.

[Endorsed]: T.C.U.S. Filed May 13, 1957.

[Title of Tax Court and Docket Nos. 52394, 52396.]

PETITION FOR REHEARING

To the Honorable Judges of the Tax Court of the
United States, Washington, D. C.

The Petitioners herein hereby respectfully request a rehearing. The grounds for this petition are as follows:

The Year 1946

As previously pointed out in Petitioners' motion, filed May 13, 1957, Petitioners submitted individual tax returns as partners of Holly Molding Devices of Chicago. Later, an amended partnership return was submitted which was prepared by a firm of certified public accountants and corresponding amended returns were submitted by the Petitioners.

There is absolutely no reason why a negligence penalty should be assessed against Petitioners under these circumstances.

Also, many proper deductions claimed by Peti-

tioners in their original and amended returns were disallowed by the Court, and Petitioners hereby request that they be given an opportunity to present additional evidence in support of these deductions and to prove that the disallowances of some were erroneous.

The Year 1947

As the record shows, Petitioners were assessed a negligence penalty for the year 1947.

Petitioners' return for that year was prepared from carefully maintained records. Such records were produced in Court at the trial, and Petitioner Albert J. Fihe testified under oath that he personally had supervision of same and had actually made most of the entries himself. Petitioners' return corresponded in all respects with the entries. However, many deductions claimed by Petitioners were disallowed and Petitioners respectfully request an opportunity to resubmit this material for further consideration by the Court and especially with a view to eliminating the negligence penalty.

The Year 1948

At the trial Petitioners produced unpaid notes and other evidence to the effect that they had, over a period of more than five years, invested approximately \$65,000.00 in the partnership business of Holly Molding Devices. Petitioners' long term profit upon selling the business was therefore less than \$35,000.00. The Court ruled otherwise.

Petitioners, when selling the business, received some cash and the remainder in non-negotiable

notes which were at that time of no real value. Payments on these notes continued over a period of almost three years. Petitioners, therefore, did not realize any profit on their original investment until at least the year 1950 or 1951. Petitioners, therefore, should not be taxed on the entire profit in the single year of 1948.

In the year 1950 your Petitioners experienced and reported an actual business loss of over \$20,000.00. This loss should be applied as a carry-back to the year 1948.

Petitioners therefore respectfully request that they be granted a rehearing in the interests of simple justice.

Burbank, California, June 11, 1957.

Respectfully submitted,

/s/ ALBERT J. FIHE,
Counsel for Petitioners.

[Stamped]: Denied June 14, 1957. /s/ Norman O. Tietjens, Judge.

Served and Entered June 18, 1957.

[Endorsed]: T.C.U.S. Filed June 13, 1957.

T. C. Memo 1956-139

Tax Court of the United States

Albert J. Fihe, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Albert J. Fihe and Elizabeth M. Fihe, Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 52394, 52396. Filed June 12, 1956.

Albert J. Fihe, Esq., for the petitioners.

Mark Townsend, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

Tietjens, Judge: The Commissioner determined the following deficiencies in income tax and additions to tax for negligence under Section 293(a):

Year	Deficiency	5% addition to tax for negligence
1946	\$9,515.06	\$475.75
1947	397.40	533.78
1948	6,926.70	346.34

The issues to be decided are:

(1) Did petitioners understate business income for each of the years 1947 to 1949, inclusive, and did they claim excessive itemized deductions in each of said years?

(2) Did petitioners understate income derived and received from Holly Molding Devices, Inc. in 1947 and 1948 by the respective amounts of at least \$10,056.57 and at least \$861.90?

(3) Did petitioners understate the taxable por-

tion of long term capital gain in 1948 derived from the sale of stock in Holly Molding Devices, Inc.?

(4) Did the Commissioner properly determine that the 5 per cent addition to tax for negligence be imposed?

A fifth issue, i.e. whether petitioner Elizabeth M. Fihe was a bona fide partner of Holly Molding Devices in 1946, has been conceded by the Commissioner and the concession can be given effect in a Rule 50 computation.

General Findings of Fact

Petitioners Albert J. Fihe and Elizabeth M. Fihe are husband and wife. They reside in Pacific Palisades, California. Albert filed a separate and an amended return for 1946 with the collector of internal revenue in Chicago, Illinois. Petitioners filed joint returns for the years 1947, 1948 and 1949, the return for 1947 being filed with the collector of internal revenue in Chicago, Illinois, and the returns for the latter two years being filed with the collector of internal revenue in Los Angeles, California.

Albert (sometimes hereafter called petitioner) has been a practicing attorney specializing in patent law for some 34 years. He maintained an office in Chicago for that length of time, closing it in 1948. He has had an office in Los Angeles, California, for 30 years. Petitioners moved from Chicago to California in 1948.

In 1936 petitioners formed a partnership, known as Holly Molding Devices, with Harry Holly. Holly's wife also had an interest in the business.

The partnership engaged in the manufacture and sale of hamburger molds. Holly was the inventor of the device and petitioner furnished his services in procuring the patent. Elizabeth was a bona fide member of the partnership in 1946, having a one-fourth interest therein.

After petitioners moved to California in 1948, Albert engaged in the practice of patent law and the manufacture and sale of fishing equipment.

Issue No. 1
Findings of Fact

The Commissioner's determination of understatement of business income for 1946 was computed as follows:

Expense	Claimed	Allowed	Disallowed
(1) Litigation Expense	\$5,720.30	\$4,720.30	\$1,000.00
(2) Travel Expense	4,763.77	3,226.30	1,537.47
Total disallowed expenses			<u>\$2,537.47</u>
(3) Unreported income—Los Angeles office			749.69
Total			<u>\$3,287.16</u>
(4) Loss, Los Angeles office, claimed on amended return, disallowed			(1,728.42)
Adjustment—increase in business income.....			<u>\$5,015.58</u>

The Commissioner's determination of understatement of business expenses for 1947 was computed as follows:

Expense	Claimed	Allowed	Disallowed
(1) Legal	\$4,269.26	\$1,669.26	\$2,600.00*
(2) Travel	5,881.56	4,433.61	1,447.95
(3) Advertising	1,042.97	487.97	555.00
Total disallowed expenses			<u>\$4,602.95</u>
(4) Gross receipts understated			943.22
Adjustment—increase in business income			<u><u>\$5,546.17</u></u>

* This item represents the payment by petitioner of legal fees for Harry Holly in connection with the defense of a criminal action against Holly.

Business income (loss) per return	(\$ 3,151.10)
Increase per above adjustment	5,546.17

Business income as adjusted \$ 2,395.07

Less:

Net operating loss from 1949 allowed 20,761.06

Business income (loss) as adjusted (18,365.99)

Business loss claimed on return (3,151.10)

Adjustment—decrease in net income \$15,214.89

For 1947 the Commissioner also disallowed certain of the itemized deductions claimed by petitioners as follows:

Deductions	Claimed	Allowed	Disallowed
(1) Contributions	\$ 448.15	\$ 356.15	\$ 92.00
(2) Taxes	7,680.88	1,397.50	6,283.38
(3) Medical—Disallowed because of percentage limitation.			

The Commissioner's determination of understatement of business income for 1948 was computed as follows:

Expense	Claimed	Allowed	Disallowed
(1) Interest	\$3,111.84	\$2,876.44	\$ 235.40
(2) Taxes	2,600.84	2,089.55	511.29
(3) Losses	3,362.44	—0—	3,362.44
(4) Freight	1,630.41	505.96	1,124.45
(5) Legal	3,326.14	2,764.39	561.75
(6) Stationery	2,794.47	2,644.47	150.00
(7) Travel	8,679.14	2,876.17	5,802.97
(8) Commissions	1,426.30	626.30	800.00
(9) Advertising	3,483.94	2,885.80	598.14
(10) Repairs	535.33	460.76	74.57
(11) Postage	732.18	488.85	243.33
(12) Phone & Telegraph	1,323.41	1,251.88	71.53
(13) Depreciation	2,755.11	773.53	1,986.58

Total Disallowed expenses \$15,522.45

(14) Add: Error in addition of deductions on
return 584.20

(15) Unreported Receipts 280.45

Adjustment—increase in business income \$16,387.10

Business income (loss) per return	(\$33,363.88)
Increase per above adjustment	16,387.10

Business income (loss) as adjusted

(\$16,976.78)

For the year 1948 the Commissioner also disallowed certain itemized deductions claimed by petitioners as follows:

Deductions	Claimed	Allowed	Disallowed
(1) Contributions	\$ 664.48	\$ 291.25	\$ 373.23
(2) Casualty loss	2,300.04	—0—	2,300.04
(3) Medical	1,089.34	735.79	Percentage limitation

The Commissioner's determination of understatement of business income for 1949 was computed as follows:

Expense	Claimed	Allowed	Disallowed
(1) Repair	\$2,517.15	\$ 407.13	\$ 2,110.02
(2) Advertising	3,658.25	976.59	2,681.66
(3) Litigation	1,042.22	794.82	247.40
(4) Travel	4,476.41	2,493.24	1,983.17
(5) Interest	3,909.95	3,308.89	601.06
(6) Postage	720.32	471.32	249.00
(7) Depreciation	2,550.40	1,843.23	707.17
(8) Telecast expense			1,661.62
(9) Bandmaster			632.50

Total disallowed expenses

\$10,873.60

(10) Receipts understated

628.78

Total

\$11,502.38

Less: Mathematical error.....

900.00

Net increase in business income

\$10,602.38

For the year 1949 the Commissioner also disallowed certain of the itemized deductions claimed by petitioners as follows:

Deductions	Claimed	Allowed	Disallowed
(1) Contributions	\$ 285.51	\$ 47.51	\$ 238.00
(2) Interest	3,909.95	—0—	3,909.95
(3) Taxes	3,511.44	—0—	3,511.44

In their 1947 return petitioners included federal income and other federal taxes such as "Transportation," "Amusement" and "Pullman" [sic] among their itemized deductions.

In their 1948 return petitioners claimed as business deductions for freight and travel expenses, the cost of moving personal possessions from Chicago to California and the cost of maintaining the family in a hotel until a new home was established.

In their 1948 return petitioners claimed a casualty loss of \$2,300.04 for "Damaged and stolen furniture and stolen wallet." Of this amount \$214 represented cash, which according to petitioner's records, was stolen from a wallet and the remainder represented the cost of purchasing new furniture to replace furniture which petitioner claimed was lost, stolen and damaged in the move to California.

Petitioner deducted automobile expenses which included the cost of travel to and from work. He also deducted the cost of new suits as advertising expenses and testified in that connection, "If I do not look pretty prosperous, I do not get patent business," and "I think it is perfectly good advertising and the only way a lawyer can advertise."

Opinion

On this issue, the deductibility of claimed expense items and the resulting increase in taxable income by virtue of their total or partial disallowance, the determination of the Commissioner "has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong," *Welch v. Helvering*, 290 U.S. 111.

Most of the items here involved were disallowed or partially disallowed because they were deemed to be "personal" expenses or were "unsubstantiated" or were "duplication(s)." Petitioners have introduced no evidence which would serve to carry their burden of proving error in the Commissioner's determination. In this respect petitioner's testimony was of the most general nature. No testimony was offered with regard to the amount of specific expense items which would assist the Court in determining whether the allowance made on items partially allowed was correct. Aside from the general testimony of petitioner that such and such items were disallowed (in other words, a mere recital of what the Commissioner did) and the admissions of petitioner that mistakes were made in the returns, which, however, "cut both ways," the record contains no evidence which would help petitioners. What little specific testimony there was with respect to some of the claimed deductions only confirms the propriety of the Commissioner's ruling. We advert here to the deductions claimed for federal income taxes paid, the expense of travel to and from work, the cost of maintaining the family in a hotel pending the establishment of a new home, the cost of new suits, and the \$2,600 attorney fee which petitioner paid to assist Holly in defending himself against criminal charges because, as petitioner testified, "Harry had a family * * * and I really hated to see my partner go to the penitentiary." While this latter testimony evidences a charitable motive, it does not establish the basis for a business deduc-

tion. We hold that the attorney fees are not an ordinary and necessary business expense. Neither are the other items properly deductible.

The record in this case is such that the so-called Cohan rule—*Cohan v. Commissioner*, 39 F. 2d 540 can have no application. There has been no total disallowance of claimed deductions here in the face of a record clearly calling for some allowance. In most instances substantial amounts have been allowed and petitioners have not come forward with evidence which would justify the Court in increasing allowances above those amounts. On items totally disallowed petitioners have offered no substantiating evidence whatever.

Turning to the claimed casualty loss, the record contains little more than that the deduction was claimed on the return for 1948 and petitioner's testimony as follows:

In that connection, when we moved our furniture out here, (to California) it was certainly in a wreck somewhere, because when we got it, most of it was almost irreparably damaged—a beautiful marble top table that we had was just broken into smithereens—some of the fine furniture looked as if it had been dragged through the mud. The upholstery was torn and almost beyond repair. Some valuable lamps were gone completely. My wife had a very valuable ring somewhere in that furniture and it never did get here. May I say that at one time I saw my wife weeping very bitterly when she saw that furniture.

This record falls far short of furnishing a basis for allowing the casualty loss. There was no evidence regarding the loss of cash in a wallet. No fair market value of the damaged furniture has been proved and no basis for the property has been shown. The claimed loss is disallowed for lack of proof. See *Helvering v. Owens*, 305 U.S. 468.

Accordingly this issue must be decided for the Commissioner.

Issue No. 2

Findings of Fact

On or about September 25, 1946, a corporation known as Holly Molding Devices, Inc. (hereafter called the corporation) was formed to carry on the business formerly carried on by the partnership. With the exception of certain improved real estate which was distributed to the former partners, all the assets and liabilities of the partnership were turned over to the corporation in exchange for capital stock which was issued to the former partners. The real estate was rented to the corporation for a time by the former partners. The corporation's name was later changed to Hollymatic Corporation.

Petitioner was named president of the corporation and Elizabeth was named treasurer. During 1946 and 1947 petitioner was in charge of the corporation's books and records. In 1947 petitioner employed Barrow, Wade and Guthrie, a firm of certified public accountants to audit the books.

Both petitioners had authority to draw checks on the corporation provided such checks were countersigned by either Harry Holly or his wife. Prior to

sale by petitioners of their stock in the corporation (as will hereafter appear) corporate checks issued by Holly or his wife were required to be countersigned by one of the petitioners.

The corporate books and records reflect that outstanding liabilities in the respective amounts of \$4,661.49 and \$3,461.29 to petitioner and Elizabeth assumed by the corporation were credited to their personal accounts in 1946.

The corporate books and records reflect that the following amounts were paid to petitioner by check in 1946:

11/1/46 Check for cash.....	\$ 500.00
11/25/46 Check for cash.....	2,000.00
	<hr/>
	\$2,500.00

These items were unexplained.

The books and records of the corporation reflect salary paid or credited to petitioner during 1947 of \$25,920. According to such books, \$14,000 less withholding, was paid to him and \$10,706.20 was credited to his personal account.

The books and records of the corporation reflect the following credits to petitioner's personal account in 1947:

\$ 724.18	Loan to corp.
10,706.20	Accrued salary
140.00	Accrued rent
5,123.03	Patent Installment payments (later reversed)
6,227.21	Patent Installment payments

100.00 Rent

918.12 Minimum on royalties

60.00 Accrued Rent

The books and records of the corporation reflect the following credits to Elizabeth's personal account in 1947:

\$875 to correct advances

140 accrued rent

100 accrued rent

60 accrued rent

The corporation books and records reflect disbursements by check of \$1,000 to petitioner and \$800 to Elizabeth on January 10, 1947 and such disbursements were debited to their personal accounts. The personal records maintained by petitioner reflect receipt of this \$1,800 amount on January 11, 1947.

The corporation books and records reflect a disbursement by check on March 17, 1947 of \$800 debited to the personal account of petitioner. The personal records maintained by petitioner reflect a cash receipt of \$800 from the corporation on March 15, 1947.

The corporation books and records reflect a disbursement by check of \$3,000 to petitioner which was debited to his personal account on April 30, 1947. The personal records maintained by petitioner reflect a cash receipt of \$3,000 from the corporation on April 22, 1947.

The corporation books and records reflect a disbursement by check on April 3, 1947 of \$1,000 which was allocated \$700 to petitioner and \$300 to Eliza-

beth and debited in such amounts to their personal accounts on April 30, 1947. The personal records maintained by petitioner reflect a cash receipt of \$1,000 from the corporation on April 1, 1947.

The corporation books and records reflect two additional disbursements by check of \$700 and \$2,325 in April which were debited to the personal account of petitioner on April 30, 1947. The personal records maintained by petitioner reflect cash receipts from the corporation of \$700 on April 17, 1947 and \$2,325 on April 26, 1947.

The corporation books and records reflect that salary in the amount of \$14,000 was disbursed by checks to petitioner in 1947. The personal records maintained by petitioner reflect cash receipts of salary in the total amount of \$11,523.10. These are net amounts and do not reflect withholding for income and social security taxes.

The corporation books and records reflect a disbursement by check to petitioner on June 20, 1947 of \$3,632.05 which was debited to his personal account on June 30, 1947. The personal records maintained by petitioner reflect a cash receipt of \$3,632.05 from the corporation on June 25, 1947.

The corporation books and records reflect a disbursement by check to petitioner on May 13, 1947 of \$2,600 which was debited to his personal account on May 31, 1947. This check was issued to pay legal fees for Harry Holly pursuant to an agreement with petitioner and the personal records maintained by petitioner do not reflect this amount as a receipt of income.

The corporation books and records reflect a debit of \$5,890 to petitioner's personal account on September 30, 1947. The personal records maintained by petitioner reflect a cash receipt of \$5,890 from the corporation on September 12, 1947.

The corporate books and records and/or the personal records maintained by petitioner reflect that the following amounts were disbursed by checks from the corporation to the petitioners in 1947:

1/10/47	\$ 1,000.00	
1/10/47	800.00	
3/17/47	800.00	
3/21/47	550.00	
4/30/47	3,000.00	
4/30/47)	1,000.00	(Reflected as \$700 debit to
4/30/47)		petitioner and \$300 debit to
		Elizabeth; Reflected as one
		receipt on petitioner's personal
		records)
4/30/47	700.00	
4/30/47	2,325.00	
5/31/47	2,600.00	
6/30/47	2.94	
6/30/47	3,632.05	
6/30/47	408.54	
9/30/47	5,890.00	
12/ 5/47	2,292.36	
Add	11,523.10	(Representing amounts dis-
		bursed by check, roughly net
		of withholding tax, as per cor-
		porate records, and petition-
		er's personal records)
Total	\$36,523.99	

(Note: Above total does not include the \$1,000 option payment of December 13, 1947, hereafter referred to.)

The books and records of the corporation reflect the following credits to petitioner's personal account in 1948:

\$ 42.50	To reverse entry applicable to Old Age Benefit— deducted from employee later.
890.67	To record purchase of furniture and fixtures from A. J. Fihe under agreement dated 1/9/48.
981.90	To close balances of Fihe's accounts, charged to A. J. Fihe's salary.
5,000.00	To record purchase of patent rights, capital stock and land and buildings from A. J. and E. M. Fihe under option agreement dated 12/13/47.

The corporate books and records reflect that petitioner received salary, net of withholding tax, in 1948 in the form of corporate checks as follows:

1/ 2/48	\$327.10	(\$72.90 withheld as taxes)
1/ 9/48	327.10	(\$72.90 withheld as taxes)
1/16/48	327.10	(\$72.90 withheld as taxes)
1/31/48	861.90	

The books and records of the corporation reflect the following debits to petitioner's personal account in 1947 which are not reflected on the personal records maintained by petitioner:

4/30/47	General Journal entry. To transfer advances to officers to proper accounts	\$ 350.00
4/30/47	G. J. entry. Charge back unauthorized sal- aries paid to executives in December	\$1,499.50
4/30/47	G. J. entry. To charge Mr. Fihe for items in equipment account covering Mr. Fihe's filing cabinets for patents and so forth	\$ 563.47
4/30/47	G. J. entry. To charge personal accounts for excess payments on taxes withheld	\$ 86.34
4/30/47	G. J. entry. To charge owners of building for mortgage and interest on same paid by the corporation	\$ 256.25
4/30/47	G. J. entry. Interest on officers life insur- ance loans, paid by the company, charged back to the appropriate officers	\$ 61.58
4/30/47	G. J. entry. To charge portion of traveling expenses to respective officers	\$ 705.96
4/30/47	No explanation	\$1,199.28
4/30/47	To adjust salaries upon which tax has been paid and not deducted	\$ 3.50
4/30/47	Cash disbursement	\$ 2.94

9/17/47	G. J. entry. To charge interest on insurance loans to officers concerned	\$ 34.04
9/30/47	G. J. entry. To correct distribution of check No. 8737 charged to Workmen's Compensation Insurance in error. Insurance agent states that this does not cover a company policy	\$ 250.00
12/ 5/47	Check issued to Mr. Fihe. Explanation of "royalties" crossed out and no explanation given	\$2,292.36
	Total	\$7,305.22

The books and records of the corporation reflect the following debits to Elizabeth's personal account in 1947 which are not reflected on the personal records maintained by petitioner:

3/21/47	Check payable to Mrs. Fihe	\$ 550.00
4/30/47	G. J. entry. To adjust salaries upon which tax has been paid and not deducted.....	\$ 1.75
4/30/47	G. J. entry. To charge back unauthorized salaries paid to executives in December	\$ 449.75
6/30/47	Check payable to Mrs. Fihe	\$ 408.54
	Total	\$1,410.04

With the exception of one entry reflecting the payment of petitioner's income tax by the partnership, petitioners' books and records reflect only receipts which were deposited in petitioners' bank accounts.

Ultimate Findings

The petitioners received or had unfettered command of at least \$10,056.57 and \$861.90 from Holly Molding Devices, Inc. in the years 1947 and 1948, respectively, which they did not report as taxable income in those years.

Opinion

Here against we are faced with the question of whether or not petitioners have carried their burden

of disproving the presumptive correctness of the Commissioner's determinations.

On this phase of the case the Commissioner determined, with respect to the year 1947, that petitioners had received additional income consisting of \$8,890 as dividends and \$1,166.57 as royalties from Holly Molding Devices, Inc. and, with respect to the year 1948, that petitioner had received \$861.90 as additional salary.

As appears from the record, these determinations were based primarily on the books of the corporation and were supported by the testimony of a witness who, at the time of the hearing and for some time prior thereto, had control of such books and records. This witness testified with respect to what the books and records showed with respect to receipts of the petitioners from the corporation in actual cash payments and also credits during the taxable years. For a time prior to sale of their stockholdings in the corporation by petitioners this witness had been charged with the responsibility of entering figures on the payroll account at a time when he was also the corporation's purchasing agent. At the time of the hearing he was comptroller of the corporation, in charge of the corporate books and records. The findings which we have made with respect to this issue are based on the testimony of this witness as to entries contained in the books and records, and while we recognize that books and records are merely evidentiary of the real nature of the transactions they reflect, yet

when we balance the comptroller's testimony against the seemingly contrary evidence, consisting as it does of petitioner's oral denial that he ever "received" the amounts testified to, together with the corroboration of the corporate records by petitioner's own records (which, however, only reflected amounts deposited in his bank accounts), we can only conclude that the evidence fails to overcome the presumption of correctness that attaches to the Commissioner's determination. See *A. W. Henn*, 20 B.T.A. 1133, pages 1150, 1151, where we said,

It is not enough to justify the exclusion of these items from his gross income derived in the course of complicated financial transactions such as are disclosed by the evidence, for petitioner to say merely that he did not receive the money in his actual possession.

To point up how true this statement is as far as 1947 goes, we point to the \$2,600 item for attorney fees paid by petitioner on behalf of his partner, Holly, in Holly's criminal case. According to the corporate record this item was at the command of petitioner and was expended by him. Yet it does not appear in his personal records as a receipt and was not reported by him as income, though he does (improperly we have held) claim it as a deduction. The failure to include this item is typical of petitioner's explanations on this score. He excused it by saying "I certainly haven't got the money. In fact I spent the money. It is gone." This, of course, is no excuse for failing to include amounts as in-

come which came into petitioner's control at a time when the corporation ostensibly could pay them and when the petitioner was in control of the corporate books and for aught that appears of record could have taken down payment directly.

A facet of petitioner's defense on this issue is his attack on the accuracy of the comptroller's testimony. Petitioner testified that after he and his wife disposed of their stock in the corporation, accountants were called in by the new management to audit the corporate books and that these accountants caused certain entries to be made which are the root of his troubles, inasmuch as so-called corrective entries made by the accountants did not truly reflect the facts. We are of the opinion that this testimony in no way destroys the probative value of the corporate books. The accountants who caused the corrections to be made were the same accountants employed by petitioner himself to audit the records at a time when he himself was in control of the corporation. Their competency is in no way impugned by petitioner's testimony and we have no reason for discounting the accuracy of entries as shown on the books.

Turning to the year 1947 we find that the Commissioner has added \$861.90 as salary to petitioner's income as additional income. For that year petitioner reported he had received salary of \$1,200 from the corporation, yet he attached to his return Form W-2 showing receipt of total wages of \$2,061.90 and withholding tax of \$206.70. It is the

difference between the \$2,061.90 shown by Form W-2 and the reported \$1,200 which the Commissioner has added to petitioner's taxable 1948 income. We find no adequate explanation whatever in the record for petitioner's faulty reporting and have found that the difference of \$861.90 should have been reported as taxable income in accordance with the Commissioner's determination.

While the notice of deficiency states that petitioners understated "dividends and royalties" received from the corporation in 1947 in the respective amounts of \$8,890 and \$1,166.57 and while it is not clear that these respective amounts were actually "royalties and dividends" rather than other forms of taxable income, we think the entire record supports the Commissioner's determination that there was an understatement of at least \$10,056.57 in taxable income for 1947, as well as an understatement of salary in the amount of \$861.90 in 1948. Accordingly, the Commissioner's determinations on this issue are sustained.

Issue No. 3

Findings of Fact

In December 1947 petitioners gave an option to the corporation whereby they agreed to sell to the corporation their capital stock, their interest in patents used by the corporation and their interest in certain improved realty which had been distributed to the partners upon dissolution of the partnership. Petitioners received a payment of \$1,000 on the option on December 13, 1947.

In January of 1948 the corporation exercised the option and paid to petitioners \$24,000 by check. In addition, the corporation gave to petitioners two notes in the total principal amount of \$70,000 secured by a chattel mortgage on the corporate machinery and equipment. Further, a credit was entered to petitioner's personal account on the corporate books in the amount of \$5,000 which settled a debit balance in that amount in his personal account.

The improved realty involved in this transaction was the real estate distributed to the individual partners upon dissolution of the partnership. It was conveyed to the corporation in 1948.

Commencing February 29, 1948 payments were made to petitioners on the notes and mortgage in the amount of \$1,750 per month plus interest. These payments continued until the entire amount was paid. Petitioners received payments on principal totalling \$17,500 in 1948.

The cost of the improved realty distributed to the four partners in September 1946 was \$11,991.32. Petitioner received his interest in the patents transferred to the corporation in exchange for his legal services in obtaining the patents.

The assets and liabilities of the partnership, with the exception of the improved realty, were transferred to the corporation in exchange for capital stock. The capital accounts of the individual partners as of the date of the transfer of the partner-

ship assets and liabilities to the corporation were as follows:

H. H. Holly.....	\$ 8,174.57
Agnes Holly	8,174.57
Albert J. Fihe.....	8,174.57
Elizabeth M. Fihe.....	8,174.57
<hr/>	
Total	\$32,698.28

At the time of the transfer, 200 shares of capital stock were issued by the corporation in the total amount of \$20,000 and paid in surplus was credited in the amount of \$12,698.28. Liabilities of the partnership to petitioners in the total amount of \$8,-122.78 were assumed by the corporation.

Petitioners reported \$41,500 as the amount realized on the sale of their interests to the corporation and a basis for such interests of \$27,624.36.

Petitioners computed on a separate schedule D the amount reported as net capital gain in their 1948 return but did not file the schedule of the return. Petitioners, in computing the net capital gain reported on their 1948 return, deducted losses incurred in the sale of a personal residence and the sale of personal furniture and fixtures.

In his determination the Commissioner disallowed the losses from the sales of the personal residence and of the furniture and fixtures.

The Commissioner also determined that petitioners realized \$100,000 in 1948 from the sale of their interests to the corporation, as follows:

Option payment (made in December 1947).....	\$ 1,000
Cash payment (made in January 1948).....	24,000
Credit to personal account of A. J. Fihe.....	5,000
Face amount of notes and mortgage.....	70,000
	<hr/>
	\$100,000

In computing gain on the sale the Commissioner deducted a basis of \$20,595.37, computed as follows:

Basis of Patents	—0—
Basis of Stock.....	\$16,349.14
Basis of Real Estate: Cost.....	\$11,991.32
Less: Depreciation	
(as adjusted by respondent).....	3,498.86
	<hr/>
	\$ 8,492.46
Petitioners' share thereof (50% of \$8,492.46).....	4,246.23
	<hr/>
	\$20,595.37

Opinion

Petitioners allege error in the Commissioner's determination on this issue as follows:

The Commissioner was in error when disallowing losses on sales of residences and furniture due to removal of business and residence from Illinois to California. The Commissioner erred in computing the long term capital gain and the sale of stock of Holly Molding Devices, Inc. He erred in arbitrarily assuming that the cost of the stock was approximately \$20,000.00, when in fact it was over \$35,000.00. The examiner further arbitrarily assessed the entire receipt for the sale of our interest in Holly Molding Devices, Inc., onto the year 1948. We received approximately \$100,000.00 for the sale of our interests in said corporation, but only \$25,-

000.00 of this was paid in cash, the remainder being secured by a mortgage note on the corporation properties and payable in monthly instalments of \$1,750.00. We reported these sums as received in 1948 and succeeding years, and should not be taxed with the entire amount in a single year when the total was not collected until several years later. Furthermore, the mortgage notes deliberately omitted the words "or order" after our names as payees, thereby making these notes non-transferable. The fact that said notes were non-transferable and non-negotiable eliminates any possibility of a tax payment on the full amount of the sale until such time as the actual amounts of the notes had been collected by us. These non-negotiable promissory notes must be considered as having no fair market value.

The alleged error in disallowing losses on the sale of the residences and furniture, which are shown by the record to have been of a personal nature needs no comment. It is almost axiomatic that such losses are not allowable. That the sales were made because petitioner moved his residence from Chicago to California because he moved his offices there in on way changes the personal character of the transaction. These claimed losses are not proper.

Turning next to the basis for the shares of stock and other property turned over to the corporation in 1948, we note that the Commissioner allowed a basis of \$20,595.37, computed as shown in our findings of fact. Petitioners claimed a basis of \$27,-

624.36. To prove error in the Commissioner's determination, petitioners rely on their self-serving oral testimony to the effect that they advanced from \$36,000 to \$50,000 to the partnership and that these advances should be taken into consideration in computing basis. To corroborate this testimony a series of notes of the partnership to petitioner aggregating some \$12,724.36 dated in 1940 and 1942 were introduced in evidence. One of the notes bore endorsements showing credits of \$6,211.29. This evidence is inadequate to overcome the correctness of the Commissioner's determination of basis which is supported by other evidence of record. Even if we accept at face value petitioners' oral testimony that they made the claimed advances to the partnership it still seems certain that substantial sums were repaid to them which would reduce the cost of their stock. Their testimony as to these transactions is fragmentary at best. They have not come forward with evidence which would establish error in the Commissioner's determination of basis, which is sustained.

Another facet of this issue is petitioners' contention that the Commissioner improperly taxed the full amount of the gain on the sale of the stock and other property to the corporation in 1948 (the year of sale) instead of prorating the gain over the years 1948 and 1949. Petitioners' contention appears to be two-pronged—first, that they are entitled to report on the installment basis and second, that the notes they received in part payment were “non-negotiable” and “must be considered as hav-

ing no fair market value.”

Petitioners are not entitled to report their gain on the installment method. In order to be so entitled the initial payment must not exceed 30 per cent of the total sales price. Here the total price was \$100,000 and in 1948 the record shows that petitioners received at least \$24,000 in cash and monthly payments totalling \$17,500 in 1948, a total of \$41,500. Thus, more than 30 per cent of the purchase price was received in 1948. Accordingly it was not proper for them to use the installment method of reporting. Sec. 44(b), Internal Revenue Code of 1939.

With respect to the claim that the corporate notes received in partial payment were “non-negotiable” and must be taken to have no fair market value, we observe that the notes themselves were not produced in evidence and that there is no evidence in the record establishing that the notes had no fair market value. Having challenged the correctness of the Commissioner’s determination that the notes had value, petitioners assumed the burden “of proving not only that respondent’s (Commissioner’s) determination of value was incorrect, but also what the correct value was, in fact.” *W. H. Batcheller*, 19 B.T.A. 1050, 1055. This burden has not been carried. Petitioners rely on *Dudley T. Humphrey*, 32 B.T.A. 280 and a memorandum opinion of this Court where non-negotiable notes were held to have no fair market value. The cases of *Mainard E. Crosby*, 14 B.T.A. 980 and *Edward J. Hudson*, 11 T.C. 1042 might also have

been cited. All, however, are distinguishable. In Humphrey the opinion specifically states, "The testimony is that the notes had no fair market value." And in Crosby and Hudson the notes were subject "to many complicated agreements and conditions." As stated above, here there is no evidence that the notes had no fair market value, the notes are not in evidence, and so far as the record goes they were not subject to conditions affecting their payment. (As a matter of fact they were paid strictly according to their tenor in a comparatively short time.) Further, the notes were secured by a chattel mortgage which was not shown to have had no fair market value.

With the record in this state we are not constrained to disturb the Commissioner's determination that the notes had a value equal to their face and are to be taken as the equivalent of cash.

Issue No. 4

Findings of Fact

We incorporate by reference the facts heretofore found and in addition find that in 1940 petitioner was admonished by an internal revenue agent to keep more accurate books and records, and that the books and records maintained by petitioner in the taxable years were incomplete and did not properly and accurately reflect the taxable income of petitioners.

Part of the deficiencies for each of the years 1946, 1947 and 1948 is due to negligence on the part of petitioner.

Opinion

We think the facts amply support the Commissioner's addition to tax for negligence. The fact that petitioner was an attorney, coupled with the inadequacy of his books, the character of the deductions and losses claimed (some of which were clearly improper and others, duplications) are sufficient evidence to justify the addition to tax for negligence.

Decisions will be entered under Rule 50.

Served and Entered June 13, 1956.

Tax Court of the United States
Washington

Docket No. 52394

ALBERT J. FIHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed June 12, 1956, petitioner and respondent filed computations for entry of decision which differed. The proceeding was placed on the calendar of September 12, 1956, at Washington, D. C., for hearing pursuant to Rule 50. Petitioner's motions for extension of hearing date filed August 6, 1956,

September 10, 1956, November 13, 1956, February 6, 1957, and April 4, 1957, were granted, finally setting this proceeding on the calendar of May 1, 1957, at Washington, D. C. Petitioner filed motion on April 24, 1957, for further extension of hearing date, which motion was denied. Upon due consideration, it is

Ordered and Decided: That there is a deficiency in income tax and 5 per cent addition to tax for negligence under section 293(a) of the Internal Revenue Code of 1939, in the respective amounts of \$2,826.87 and \$141.34, for the taxable year 1946.

[Seal] /s/ NORMAN O. TIETJENS,
Judge.

Entered April 30, 1957.

Tax Court of the United States
Washington

Docket No. 52396

ALBERT J. FIHE and ELIZABETH M. FIHE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed June 12, 1956, petitioners and re-

spondent filed computations for entry of decision which differed. The proceeding was placed on the calendar of September 12, 1956, at Washington, D. C., for hearing pursuant to Rule 50. Petitioners' motions for extension of hearing date filed August 6, 1956, September 10, 1956, November 13, 1956, February 6, 1957, and April 4, 1957, were granted, finally setting this proceeding on the calendar of May 1, 1957, at Washington, D. C. Petitioners filed motion on April 24, 1957 for further extension of hearing date, which motion was denied. Upon due consideration, it is

Ordered and Decided: That there are deficiencies in income tax and 5 per cent additions to tax for negligence under section 293(a) of the Internal Revenue Code of 1939, for the taxable year 1947, in the respective amounts of \$397.40 and \$533.78, and for the taxable year 1948, in the respective amounts of \$6,926.70 and \$346.34.

[Seal] /s/ NORMAN O. TIETJENS,
Judge.

Entered April 30, 1957.

Served and Entered May 1, 1957.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket Nos. 52,394, 52,396

[Title of Cause.]

NOTICE OF FILING OF PETITION
FOR REVIEW

Chief Counsel, Internal Revenue Service, Washing-
ton 25, D. C.

Sir: Notice is hereby given of the filing of a peti-
tion for review in the above entitled matters.

/s/ ALBERT J. FIHE,
Attorney for Petitioners-
Appellants.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. July 31, 1957.

[Title of Court of Appeals and Causes.]

PETITION FOR REVIEW

To the Honorable the Judges of the United States
Court of Appeals for the Ninth Circuit:

Petitioners above named hereby request review
by this Honorable Court of the decisions of the
Tax Court of the United States entered in the
above matters on April 30, 1957.

The reasons for this petition are as follows:

1. The Honorable Judge of the Tax Court erred

in holding that Petitioners understated their business income for the years 1947 to 1949, inclusive, and erred in not allowing itemized and proper deductions in each of said years.

2. The Honorable Judge erred in holding that Petitioners understated income derived from the corporation known as Holly Molding Devices, Inc., of Chicago, Illinois, for the years 1947 and 1948. Petitioners assert that the corporate records were deliberately changed and falsified after Petitioners sold their interests and stock in the company.

3. The Tax Court erred in taking into consideration the fact that the then president of Holly Molding Devices, Inc., namely Harry H. Holly, was an ex-convict, having served a term in the federal penitentiary for attempted income tax evasion and also for actual bribing of an internal revenue agent. The statements and records of such a person should not be given precedence or preference over the word of a reputable attorney, sworn to uphold the Constitution, and especially as he actually reported Holly's wrong doings to the Federal Bureau of Investigation and the Internal Revenue Department.

4. The Judge of the Tax Court erred in holding that the Petitioners did not invest at least \$35,000.00 to \$50,000.00 in the corporation's predecessor partnership known as Holly Molding Devices during the ten years of 1936 to 1945, inclusive, and in ruling that the Petitioners realized a long term capital gain of about \$80,000.00 when selling

their stock in the corporation in 1948. Petitioners' profit was not over \$50,000.00, and was distributed over several years.

5. The Judge erred in assessing a negligence penalty against the Petitioners for each of the years 1946, 1947 and 1948, regardless of the fact that Petitioners' 1946 return was prepared by a firm of certified public accountants and regardless of the fact that Petitioners at the trial submitted books of record showing careful and individual entries for all their business transactions for the years 1947, 1948 and 1949, which corresponded with their returns for those years.

6. The Tax Court erred in ruling that the non-negotiable notes which Petitioners received when selling their stock in the corporation represented actual cash and taxed Petitioners accordingly. Payments on these notes extended over a period of more than three years, and taxes should accordingly have been so distributed. The Court erred in taxing the Petitioners on the entire sum in the year 1948, although payments were never assured and could not have been collected by Petitioners under any circumstances in the one year 1948.

7. The Court erred in determining a tax deficiency against the Petitioners of approximately \$7,000.00 for the year 1948, when, in fact, Petitioners experienced and reported a business loss of over \$20,000.00 in the year 1950, which should be applied as a carry-back to the year 1948. Petitioners' profits for 1948 were not substantial in any event.

8. The Judge erred in not recognizing the proven fact that Petitioners saved the United States Government untold sums of money in reporting the wrong-doings and fraudulent actions of Harry H. Holly, his company auditor and the Internal Revenue agent conspiring with them. The honesty and integrity of the Petitioners have been proven to be above reproach and any reasonable doubt should be resolved in Petitioners' favor.

Petitioners reside in Pacific Palisades, California, filed their returns for 1946 and 1947 with the Collector of Internal Revenue in Chicago, Illinois, and filed their returns for 1948 and 1949 with the Collector of Internal Revenue in Los Angeles, California. This establishes venue in the Ninth Circuit.

July 23, 1957.

Respectfully submitted,

/s/ ALBERT J. FIHE,
Attorney for Petitioners-
Appellants.

/s/ ELIZABETH M. FIHE.

[Endorsed]: T.C.U.S. Filed July 29, 1957.

[Title of Tax Court and Docket Nos. 52394, 52396.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 23, inclusive, constitute and are all of the original papers, as called for by the "Designation of Contents of Record on Review", including Petitioners' exhibits 2 thru 8, (9 Marked for Identification and not left with the record), 10 thru 12, admitted in evidence, and Respondent's exhibits A thru M, admitted in evidence, but excepting the document in item 2 which is not of record, in the cases before the Tax Court of the United States docketed at the above numbers and in which the Petitioners in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of September, 1957.

[Seal] HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

The Tax Court of the United States

Docket Nos. 52394, 52396

ALBERT J. FIHE, ALBERT J. FIHE and
ELIZABETH M. FIHE, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DEPOSITION OF FRANK H. WISCONS

The deposition of Frank H. Wiscons, taken on behalf of the Respondent, in the above-entitled case before Roscoe C. Giles, Jr., a notary public of Cook County, Illinois, and the duly authorized agent of R. C. Herchenroeder, on the 10th day of October, A.D. 1955, at Room 16139, 17 North Dearborn Street, Chicago, Illinois, pursuant to the Order to Take Depositions hereto annexed.

Present: Mr. Paul Levin appeared for respondent; Mr. Albert J. Fihe appeared for petitioners. Mr. Wolgel, Internal Revenue Agent. [1]*

Mr. Levin: This is a deposition of Frank H. Wiscons of Hollymatic Corporation, which we are taking under an order of The Tax Court of the United States, dated August 24, 1955, a copy of which order I am presenting now to the court reporter.

* Page numbers appearing at top of page of Original Deposition.

(Deposition of Frank H. Wiscons.)

(Document tendered.)

Mr. Levin: Present at the deposition are myself, Paul Levin, Counsel for Respondent, Mr. Albert J. Fihe, Petitioner and Counsel per se, and Mr. Wolgel, Internal Revenue Agent, and the Witness, Frank H. Wiscons of Hollymatic Corporation.

FRANK H. WISCONS

called as a witness by the Respondent, pursuant to order under Rule 45 of the Rules of Practice Before the Tax Court of the United States, having been first duly sworn, testified as follows:

Examination

Q. (By Mr. Levin): What is your name?

A. Frank H. Wiscons.

Q. Where do you reside, Mr. Wiscons?

A. 10717 South Keller Avenue, Oaklawn, Illinois.

Q. By whom are you employed?

A. Hollymatic Corporation.

Q. Where is that located?

A. 433 West 83rd Street.

Q. Chicago, Illinois? [3]

A. Chicago, Illinois.

Q. What are your duties with the Hollymatic Corporation? A. I am the comptroller.

Q. How long have you been employed as comptroller?

A. I became comptroller of Hollymatic the beginning of 1948—the early months of 1948.

(Deposition of Frank H. Wiscons.)

Q. What did you do for the Hollymatic Corporation before that?

A. I was the purchasing agent.

Q. Who had control and custody of the books and records of Hollymatic Corporation during the years 1946 and 1947?

A. My only recollection is Mr. Fihe used to handle the books.

Q. That is Albert J. Fihe who is the petitioner herein? A. That is right, sir.

Q. Are these books and records kept in your control and custody now? A. Yes, sir.

Q. Are these books and records which you brought here, pursuant to subpoena, the books and regular records of Hollymatic Corporation?

A. Yes, sir.

Q. Have you examined the books and records of Hollymatic Corporation for the years 1946 and 1947? A. Have I examined them?

Q. Yes. [4]

A. I looked them over prior to bringing them down here.

Q. Does it appear that they are the books and records that were made in the regular course of business? A. Yes.

Q. Was it the regular course of business to maintain such books and records of Hollymatic Corporation? A. Yes, sir.

Q. Would you please tell what books and records were maintained by Hollymatic Corporation?

A. Well, in the years 1946, 1947, they had a

(Deposition of Frank H. Wiscons.)

cash book, cash receipts, and cash disbursements. I do not recall having any general journal or general ledger at that time; and I think there was a purchase journal and a sales journal.

Q. Mr. Wiscons, when was the Hollymatic Corporation organized?

A. Hollymatic Corporation was organized on October 1, 1946.

Q. Prior to that time what was the company known as? A. Holly Molding Devices, Inc.

Q. Was it known as such during the years 1946 and 1947?

Strike that.

Now, then, the books and records of Hollymatic Corporation contained an account showing the capital stock of the corporation as of October 1, 1946?

A. Yes, sir. [5]

Q. In what book would that be found?

A. That would be in the general ledger.

Q. Would you please tell the Court what the capital stock was as of October 1, 1946?

A. \$20,000.

Q. Do the books and records also contain an account showing the paid in surplus as of October 1, 1946? A. Yes, sir.

Q. Would you please look at the books and records and tell the Court what the paid in surplus was as of that date?

A. The paid in surplus was \$12,698.28.

Q. Directing your attention to the date October 1, 1946, can you look at the books and records and

(Deposition of Frank H. Wiscons.)

see whether there is a liability account due to Albert J. Fihe and Elizabeth M. Fihe?

Mr. Fihe: Before he answers, may I have the question repeated, please, Mr. Giles?

(Question read.)

Mr. Fihe: Thank you.

The Witness: Yes, there was.

Q. (By Mr. Levin): Was there any liability reflected as of October 1, 1946?

A. Yes, there was.

Q. What was the amount of that liability, please, as shown by the books and records? [6]

A. Shown for Albert J. Fihe was \$4,661.49; for Mrs. Elizabeth M. Fihe, \$3,461.29.

Q. Would you please examine the books and records and advise the Court when these liabilities were finally liquidated?

A. The total of the liabilities were liquidated January 31, 1948.

Mr. Fihe: May I have that answer read?

(Answer read.)

Q. (By Mr. Levin): In what account, Mr. Wiscons, are those liabilities reflected?

A. That is the personal account of Mr. Albert J. Fihe and Mrs. Elizabeth M. Fihe.

Q. And they have separate accounts; is that correct? A. That is right.

Q. Do those books and records of Hollymatic Corporation show the amount of salary paid to and credited to Mr. Albert J. Fihe during the year 1947? A. They do.

(Deposition of Frank H. Wiscons.)

Q. Where would that be reflected, Mr. Wiscons?

A. Well, we have a payroll record book here, and—let's see—we have executive salaries. Also, we have it under the category "Salaries Executives".

Q. Is that posted to a ledger account of the individual officers? [7]

A. It is posted to the subsidiary payroll account of each individual.

Q. Do you have the subsidiary payroll account which reflects the salaries to Mr. Albert J. Fihe?

A. I have that, sir.

What year was that?

Q. For the year 1947. A. 1947.

Q. Will you please tell the Court what the books and records of Hollymatic Corporation show was paid or credited as salary to Albert J. Fihe for the year 1947?

A. For the year 1947, we paid or credited to Mr. Albert J. Fihe \$25,920.

Q. Would you please read the entries of that subsidiary payroll book?

A. The total for the second quarter, which began May 9, 1947: A total of \$3600 was paid to Mr. Fihe for that quarter. The total of the third quarter paid to Mr. Fihe was \$5,200. The total of the fourth quarter was \$5,200 plus \$11,920 which was credited to his personal account.

Q. Would you please look at the books of the Hollymatic Corporation, specifically the general journal, and read the entry of April 30, 1947, by

(Deposition of Frank H. Wiscons.)

which the \$11,920 was credited to the salary account—was charged to the salary account?

A. April 30, 1947—— [8]

Mr. Fihe: Before he answers the question, may I have it read back, please?

(The question was read as follows:

“Q. Would you please look at the books of Hollymatic Corporation, specifically the general journal, and read the entry of April 30, 1947, by which the \$11,920 was charged to the salary account?”)

Mr. Fihe: Let us get it exactly the way the question was asked, please, in the actual words; and if there was a correction or an indication of a correction, please have the record show the same.

Now, will you again read it back, please.

(The question was read as follows:

“Q. Would you please look at the books of Hollymatic Corporation, specifically the general journal, and read the entry of April 30, 1947, by which the \$11,920 was credited to the salary account—was charged to the salary account?”)

Mr. Fihe: That is all you have?

The Reporter: It is, Mr. Fihe.

The Witness: The entry you are speaking of is \$23,840; was charged to executive salary.

Q. (By Mr. Levin): Would you please read the debits or credits?

A. There was a debit of \$23,840; a credit of \$85 was against the O. A. B. tax—employees; a credit of \$2,444.60 [9] was credited to employees’

(Deposition of Frank H. Wiscons.)

income taxes withheld; a credit of \$10,706.20 was credited to the account of Albert J. Fihe; and a credit of \$10,604.20 was credited to the account of Harry H. Holly.

Mr. Fihe: Would you please read the answer?
(Answer read.)

Q. (By Mr. Levin): Would you please also read the legend that goes with the entry?

A. All right. The explanation is: To set up executive salaries accrued but not paid for seven months ended April 30, 1947.

Mr. Fihe: I had better have the complete answer read, please.

(The answer was read as follows:

“A. There was a debit of \$23,840; a credit of \$85 was against the O. A. B. tax employees; a credit of \$2,444.60 was credited to employees’ income taxes withheld; a credit of \$10,706.20 was credited to the account of Albert J. Fihe; and a credit of \$10,604.20 was credited to the account of Harry H. Holly.

“The explanation is: To set up executive salaries accrued but not paid for seven months ended April 30, 1947.”)

Q. (By Mr. Levin): Mr. Wiscons, do the books reflect how much of an [10] amount, shown as officer’s salary to Albert J. Fihe, was credited to personal drawings? A. Yes, it does.

Q. Would you please examine the books and records and advise the Court how much of it was credited to personal drawings?

(Deposition of Frank H. Wiscons.)

A. \$10,706.20 of this subsidiary payroll ledger was credited to personal account of Mr. Albert J. Fihe.

Q. What do the records show for the balance of the amounts shown as salaries on the books?

A. I do not follow you there, Mr. Levin.

Q. Would the balance be paid by check?

A. That is right, the balance would be paid by checks.

Q. Now, Mr. Wiscons, are the corporation's expenses ordinarily recorded on the books and records of the Hollymatic Corporation?

A. They are entered into the cash disbursements book, under the name of the persons that drew the check, and the charge is made to the account, such as advertising or travel expense or something similar to that. That is made in the cash disbursements book.

Q. Would any of the corporate expenses be charged against drawings?

A. Would you please state that once more?

(Question read.)

A. I am afraid I cannot answer that. I don't know just [11] how those things were set up at that time. There are some entries here which credit Mr. Fihe on journal entries, and there are also some journal entries that charge the personal account.

Q. Do you have those——

Mr. Fihe: I object to the last part of the answer as purely volunteered. The witness has already testified that he did not know.

(Deposition of Frank H. Wiscons.)

I move that said portion of the answer be stricken.

May it be noted on the record that counsel for respondent has just pointed to a portion of the open page of the book which the witness is holding, and that the witness did make an inaudible answer.

Q. (By Mr. Levin): Mr. Wiscons, do you have the cash disbursements record of Hollymatic Corporation for the year 1946 with you?

A. From October 1, 1946, yes.

Q. Directing your attention to November 30, 1946——

A. Yes?

Q. (Continuing) ——would you please tell the Court what the records of Hollymatic Corporation show as being debited to the personal account of Mr. Albert J. Fihe?

A. We have shown as a debit to the account of Albert J. Fihe, \$2,500 from the cash disbursements book.

Q. Is there an explanation as to that amount?

A. Let's see. No, sir, all it is is a check made out November 1, for \$500 to Mr. Albert J. Fihe, and a check on November 25, 1946, made payable to Mr. Albert J. Fihe for \$2,000.

Q. Do you have the cash disbursements record for the Hollymatic Corporation for the year 1947?

A. Yes, I have.

Q. Directing your attention to January 31, 1947, would you please tell the Court what the books and records of Hollymatic Corporation show as debited

(Deposition of Frank H. Wiscons.)

to the personal account of Mr. Albert J. Fihe?

A. There is an entry in our general ledger as of January 31, debiting Mr. Albert J. Fihe for \$1,000.

Q. Is there any explanation as to that amount?

A. No, sir, there is just a check issued on January 10 in the amount of \$1,000 and charged to the account of Albert J. Fihe.

Q. Directing your attention to March 31, 1947, would you please tell the Court what, if any, debits were made to the personal account of Mr. Albert J. Fihe?

A. March 31: There was a debit of \$800 to the account of Mr. Albert J. Fihe.

Q. Is there any explanation for that amount?

A. No, there isn't. There was a check issued on March 17 in the amount of \$800 and charged to Mr. Albert J. Fihe's account. [13]

Q. Directing your attention to April 30, 1947, would you please tell the Court what debits were made, if any, to the personal account of Mr. Albert J. Fihe?

A. What was the date, please?

(Record read.)

A. April 30, 1947: We have two entries in our general ledger to the account of Mr. Albert J. Fihe; one in the amount of \$3,725 and the other in the amount of \$3,000 even.

Q. Are there any explanations for those amounts?

A. The one for \$3,000 has an explanation. It was written to Mr. A. J. Fihe, and the explanation is "loan from corporation."

(Deposition of Frank H. Wiscons.)

The other amount of \$3,725 was issued in the form of three checks, two of them in the amount of \$700 each, and one in the amount of \$2,325 even.

Q. Do those contain any explanation?

A. Those last three, no, sir.

Q. Do you have the general journal of Hollymatic Corporation for the year 1947 with you, Mr. Wiscons?

A. Yes, sir, I have.

Q. Directing your attention to April 30, 1947, what credits are shown on the books and records of Hollymatic Corporation on that day—that is, a credit to the personal account of Albert J. Fihe?

A. There is one credit, dated April 30, in the amount of \$724.18. [14]

There is another one credited in the amount of \$10,706.20.

There is another one credited on April 30, in the amount of \$140; and there is another credited on April 30 in the amount of \$5,123.03.

Q. Directing your attention to the one of \$724.18 is there an explanation as to that shown on the books and records of Hollymatic Corporation?

A. The one for \$724.18 Entry No. 7 on April 30, charging “notes payable policy holders bureau, for \$1,079.76, crediting the account of Albert J. Fihe in the amount of \$724.18, crediting Harry H. Holly in the amount of \$355.58.

The explanation in the journal is: To credit A. J. Fihe and Harry H. Holly for proceeds of insurance loans advanced to the corporation.

Q. Directing your attention to the credit of \$10,-

(Deposition of Frank H. Wiscons.)

706.20, would you please tell the Court what explanation the books and records show as to that credit?

A. That is Entry No. 12 in our journal as of April 30. The debit is to executive salaries for \$23,840 even.

Q. Is this the same entry which you have previously read into the record, Mr. Wiscons?

A. Yes, I re-read this entry. I do not think we have to re-read it, then. It is in the record.

Q. Directing your attention to the credit to the account [15] of Albert J. Fihe of \$140, would you please tell the Court what explanation the books and records of Hollymatic Corporation show as to that amount?

A. On April 30 we have Entry No. 28 set up: debiting the account of rent for \$560 even; crediting the accounts of Albert J. Fihe, \$140 even; Harry H. Holly, \$140 even; Elizabeth M. Fihe, \$140 even; Agnes Holly, \$140 even.

The explanation is: to set up rent on building at 6733 South Chicago Avenue for seven months ended April 30.

Q. Directing your attention to the credit to the account of Albert J. Fihe for the amount of \$5,123.03, would you please tell the Court what explanation, if any, there was as to that amount?

A. That is Entry No. 48. The debit is for liability from minimum payment under the patent purchase contract in the amount of \$5,955.40. We have another debit to the account of patent expense. That amount is \$4,290.66.

(Deposition of Frank H. Wiscons.)

The credit on that entry is Albert J. Fihe for \$5,123.03; and Harry H. Holly is credited for \$5,123.03. Explanation: to set up patent instalment payments due for seven months ended April 30, 1947, based on sales.

Q. Directing your attention to the personal account of Albert J. Fihe in the books and records of Hollymatic Corporation, specifically on the date April 30, 1947, were there any credits made to that account—I mean—correct that to read debits made to that account. [16]

Mr. Fihe: Do you have the question as given, Mr. Reporter?

The Reporter: Yes, sir.

The Witness: There is debited on April 30, \$3,725 to the personal account of Mr. Fihe. On April 30, again, \$3,000; on April 30, again, \$1,199.28, \$3.50, \$1,499.50; \$563.47; \$86.34; \$350 even, \$256.25, \$61.58; \$705.96, and the last one on April 30 was \$5,123.03.

Q. (By Mr. Levin): Directing your attention to the debit \$350 made on April 30, will you please tell the Court what explanation there is, if any, in the records of Hollymatic Corporation as to that entry?

A. On April 30 Entry No. 21, we debited the account of Harry H. Holly for \$350; we debited the account of Albert J. Fihe for \$350. We debited the account of Agnes Holly \$175 and we credited the account of Elizabeth M. Fihe \$875 even.

(Deposition of Frank H. Wiscons.)

The explanation is: to transfer advances to officers to proper accounts.

Q. Directing your attention to the amount of \$1,499.50, would you please tell the Court what explanation there is as to that entry?

A. That is Entry No. 13, dated April 30, debiting the account of Albert J. Fihe \$1,499.50, debiting Harry H. Holly, [17] \$1,499.50; debiting Elizabeth M. Fihe \$449.75; debiting Agnes Holly, \$449.75. The credit is to salaries and wages of \$3,898.50.

The explanation is: to charge back unauthorized salaries paid to executives in December.

Q. Directing your attention to——

Mr. Fihe: Hold it just a moment please.

Thank you.

Q. (By Mr. Levin): Directing your attention to the debit in the account of Albert J. Fihe in the amount of \$5,000—strike that—in the amount of \$563.47, would you please tell the Court what explanation there is in the books and records of Hollymatic Corporation as to that amount?

A. That is Entry No. 14, dated April 30, debiting the account of Albert J. Fihe, \$563.47; crediting equipment, \$563.47. Explanation: charge Mr. Fihe for items in equipment account covering Mr. Fihe's filing cabinets for patents and so forth.

Q. Directing your attention to the amount of \$86.34, would you please tell the Court what explanation there was to that amount?

A. That is Entry No. 15, dated April 30. The

(Deposition of Frank H. Wiscons.)

debit is to Albert J. Fihe for \$86.34. The debit is to Harry H. Holly for \$86.33; the credit to employees' income taxes withheld, \$172.66.

The explanation is: to charge personal accounts for excess payments on taxes withheld. [18]

Q. Directing your attention to a debit to the personal account of Albert J. Fihe in the amount of \$350 would you please tell the Court what explanation there is, if any, to that amount?

A. I read that.

Mr. Levin: Strike that.

Q. (By Mr. Levin): Directing your attention to the amount of \$256.25 debited to the account of Mr. Albert J. Fihe, would you please tell the Court what explanation there is, if any, as to that amount.

A. That is Entry No. 37, dated April 30, a debit to Albert J. Fihe in the amount of \$256.25, to Harry H. Holly in the amount of \$256.25, Elizabeth M. Fihe, in the amount of \$256.25; Agnes Holly, \$256.25; and the credit is first mortgage payable, \$1,000 even. There is an additional credit to interest of \$25.

The explanation is: to charge owners of building for mortgage and interest on same paid by the corporation.

Q. Directing your attention to the debit \$61.58 on April 30, 1947, would you please tell the Court what explanation there is as to that?

A. That is Entry No. 38; Albert J. Fihe was debited for \$61.58; Harry H. Holly was debited

(Deposition of Frank H. Wiscons.)

for \$30.23. Interest was credited for \$91.81. The explanation is: interest on [19] officers' life insurance loans, paid by the company, charged back to the appropriate officers.

Q. Directing your attention to the amount of \$705.96, shown as a debit to the personal account of Albert J. Fihe, would you please tell the Court what explanation there is, if any, as to that amount?

A. Entry No. 39 is debited to Albert J. Fihe in the amount of \$705.96; a debit to Harry H. Holly in the amount of \$1,794.97; credit—travel expense, \$2,500.93. Explanation: to charge portion of traveling expenses to respective officers as above.

Q. Directing your attention to the debit of \$5,123.03, shown as a debit to the personal account of Albert J. Fihe, would you please tell the Court what explanation there is after that amount?

A. That is Entry No. 49. The debits are for liability for minimum patents payments under instalment contract for purchase of patents. The amount is \$170,000. The next debit is to patents in the amount of \$5,955.40. The following debit is to the account of Albert J. Fihe, \$5,123.03. The last debit is to the account of Harry H. Holly of \$5,123.03.

The credits are as follows: patents, \$170,000 even. Patent expense, \$5,955.40. Liabilities for minimum payment under instalment contract for purchase of patent, \$5,955.40; patent expense, \$4,290.66. [20]

The explanation is: to cancel journal entries Nos.

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31, 47, and 48, relative to patent payments contract for purchase not signed.

Mr. Levin: It is now 11:25. We will recess for lunch and resume at 12:30.

(Whereupon, a recess was taken until 12:30 o'clock, p.m.) [21]

Afternoon Session, 12:30 P.M.

(Whereupon the deposition was resumed, pursuant to the taking of the recess, at 12:30 o'clock p.m.)

FRANK H. WISCONS

called as a witness by and on behalf of the Respondent, and, having been previously duly sworn, was examined and testified further as follows:

Examination—(Continued)

Q. (By Mr. Levin): You are the same Mr. Wiscons who was previously sworn in and testified this morning, are you not? A. Yes, sir.

Q. Mr. Wiscons, directing your attention to the books and records of the Hollymatic Corporation, showing the personal account of Albert J. Fihe with respect to the date May 31, 1947, what debits, if any, are recorded on that date?

A. We have a debit from the cash disbursements book to the account of Mr. Fihe in the amount of \$2,600.

Q. Do you have that cash disbursement book here? A. Yes, I have.

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Q. Will you please look into the cash disbursements book and state what explanation, if any, appears there?

A. The entry is made as of May 13, issued check to Albert Fihe in the amount of \$2,600. The explanation is: loan from the corporation. [22]

Q. Directing your attention, Mr. Wiscons, to June 30, 1947, what debits were made to the personal account of Albert J. Fihe on that date, if any?

A. There is an entry here from the cash disbursements book debiting Mr. Albert J. Fihe in the amount of \$3,634.99.

Q. Would you please look at the cash disbursements book and tell the Court what explanation there is as to that amount?

A. There are two entries. One is made to cash and charged to the account of A. J. Fihe for \$2.94. The next entry was made on June 20 as a check issued to Mr. Albert J. Fihe in the amount of \$3,632.05; and there is no explanation as to what that is. That combines to total \$3,634.99.

Q. Directing your attention to September 30, 1947, what debits, if any, were made to the personal account of Albert J. Fihe on the books and records of Hollymatic Corporation?

A. September 30, 1947, we have a debit in the amount of \$34.04; another debit in the amount of \$5,890 even; another debit in the amount of \$250 even; and that is all the debits as of September 30.

Q. Will you please examine—strike that.

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On what books of the Hollymatic Corporation are entered the original debits and credits with respect to those items?

A. With respect to these items, those are all journal entries made in the general journal of Hollymatic Corporation. [23]

Q. Will you please tell the Court what explanation, if any, and the entries which were made to reflect those debits which were made in the general journal book?

A. The amount of \$34.04—this is Journal Entry No. 4, dated September 7—is a debit to the account of A. J. Fihe; and there is a debit to the account of Harry H. Holly in the amount of \$16.71. The credit for that is credited to interest expense in the amount of \$50.75.

Q. Would you please read the debit as shown on the book, Mr. Wiscons?

A. \$34.04 to the charge of Mr. A. J. Fihe and a debit of \$16.71 to Mr. Harry H. Holly.

Q. Would you please read the explanation as to that?

A. The explanation is—for this is: to charge interest on insurance loans to officers concerned.

The next charge is \$5,890 which is Entry No. 10 of September 30.

Q. Of 1947?

A. 1947.

The debits for that entry were \$37.35 debited to back charges; \$50 was debited to the accounts receivable; \$1.25 was debited to salesman's salaries;

(Deposition of Frank H. Wiscons.)

\$75 was debited to advertising expense; \$5,890 was debited to Mr. A. J. Fihe.

The credits on that transaction were credit cash, \$6,037.11. Discounts allowed five cents; payroll cash [24] account, \$1.86; freight, \$14.12; the returns and allowances, one penny. Explanation is: to correct errors in cash detail record.

The next debit on September 30 in the amount of \$250 was debited to Mr. A. J. Fihe. The credit was insurance expense, \$250. This Entry No. 11 is dated September 30, 1947, by the way.

The explanation is: to correct distribution of Check No. 8737 charged to Workmen's Compensation Insurance in error on November 14, 1946. Insurance agent states that this does not cover a company policy.

Q. Directing your attention, Mr. Wiscons, to September 30, 1947, what credits, if any, appear on the personal account of Albert J. Fihe?

A. There are two credits that appear on the personal account and both are dated September 30, one in the amount of \$6,227.21; the other in the amount of \$100 even.

Q. Please read the explanation which appears on the books and records of Hollymatic Corporation with respect to those debits—credits.

A. Entry No. 13, dated September 30, 1947, a debit to the patent expense for \$4,290.66; a debit to liability for minimum payment under patent contract, \$8,163.75.

The credit is to Albert J. Fihe in the amount

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of \$6,227.21, and the other credit is to Harry H. Holly in the amount of \$6,227.21. [25]

The explanation is: Patent instalment due under contract for year ended 9/30/47.

The next journal entry dated September 30, 1947, Entry No. 27 is charged debit rent, \$400; credit A. J. Fihe, \$100; credit Elizabeth M. Fihe, \$100; credit Harry Holly, \$100; credit Agnes Holly, \$100.

The explanation is: to charge rent on building at \$80 per month for five months ended 9/30/47.

Q. Directing your attention to December, 1947, what debits, if any, appear on the personal account of Albert J. Fihe on the books and records of Hollymatic Corporation?

A. One debit appears in the amount of \$2,292.36.

Q. Would you please read the explanation which appears in the books and records of Hollymatic Corporation with respect to that item?

A. There is one entry here: a check issued to Mr. Fihe on December 13, in the amount of \$1,000. The explanation was: corporation deposit on option.

There is also another entry here on December 5, 1947, where a check was issued to Mr. Albert J. Fihe in the amount of \$2,292.36, which is the amount that is on this.

Q. What explanation, if any, is shown for that?

A. It was written down here "royalties", and then it was scratched out and there is no explanation as far as I can see. [26]

Q. Directing your attention to December 20, 1947, what credits, if any, were shown to the per-

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sonal account of Mr. Albert J. Fihe on the books and records of Hollymatic Corporation?

A. December 20, we have one credit shown on the account of Mr. Albert J. Fihe in the amount of \$918.12.

Q. Would you please tell the Court what explanation is shown on the books and records of Hollymatic Corporation with respect to that debit and the source from which you are reading?

A. I am reading from the general journal of Hollymatic Corporation, and it is Entry No. 5. The debit is to the liability for minimum payment on patent purchase in the amount of \$1,836.25. The credit was to the account of Harry H. Holly in the amount of \$918.13, and a credit to the account of A. J. Fihe in the amount of \$918.12.

The explanation is: to record minimum on royalties.

Excuse me. There is one more entry on December 31, of 1947, which is a credit of \$60 to the account of Albert J. Fihe.

Q. Would you please read the explanation pertaining to that credit?

A. That entry is made December 31, 1947.

Q. In what book is the entry made?

A. This is made in the general journal of Hollymatic Corporation, debiting rent \$240, crediting A. J. Fihe, \$60; crediting H. H. Holly, \$60; crediting Elizabeth Fihe, \$60; crediting Agnes Holly, \$60.

The explanation is: to accrued rents under lease agreement. [27]

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Q. Directing your attention to January 31, 1948, what credits, if any, appear on the books and records of Hollymatic Corporation with respect to the personal account of Albert J. Fihe.

A. There are four credits on January 31: one in the amount of \$42.50; another in the amount of \$890.67; another in the amount of \$981.90; and the last in the amount of \$5,000 even.

Q. Would you please read the explanation for those credits and the source from which you are getting the explanation?

A. I am getting this information from the general journal of Hollymatic Corporation. The entry is made on January 31, to accrued OAB tax—employee; a debit of \$85 accrued OAB tax—employee, of \$85.

The credits are: H. H. Holly in the amount of \$42.50; A. J. Fihe in the amount of \$42.50; OAB taxes in the amount of \$85 even.

The explanation is: to reverse audit in Journal Entry No. 12 dated April 30, 1947, applicable to OAB. This was deducted from the employees later.

The next credit of \$890.67 is debited furniture and fixtures, \$890.67; credit A. J. Fihe, \$890.67.

The explanation is: to record purchase of certain [28] furniture under purchase agreement, dated January 19, 1948.

The next credit entry in the amount of \$981.90—that is dated January 31, 1948, debit officers' salaries \$861.90; debit Elizabeth M. Fihe, \$120 even; credit Mr. A. J. Fihe \$981.90.

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The explanation is: to close balances of Fihe's accounts, charged to A. J. Fihe's salary.

The next entry in the personal account is in the amount of \$5,000. This is found on page 8 of the journal, general journal, dated January 31, 1948; debit patents \$45,000 even; debit treasury stock \$50,000 even; debit land \$5,000 even; credit option \$25,000 even; credit mortgage payable \$70,000 even; credit Mr. A. J. Fihe \$5,000 even.

Explanation: to record purchase of patent rights, capital stock, and land and buildings from Mr. A. J. Fihe and Elizabeth M. Fihe under option agreement dated December 13, 1947.

Q. After that last credit, Mr. Wiscons, what do the books and records show as the balance of the personal account of Albert J. Fihe?

A. They show a zero balance at that time.

Q. Mr. Wiscons, do the books and records of Hollymatic Corporation also contain the personal account for Elizabeth M. Fihe?

A. Yes, it does. [29]

Q. Would you please turn to that account?

I believe you testified previously that as of October 1, 1946, the credit balance in that account was \$3,461.29; is that correct?

A. That is correct, sir.

Q. Directing your attention to October 31, 1946, what debits, if any, appear on the books and records of Hollymatic Corporation to the personal account of Elizabeth M. Fihe?

A. October 31, 1946, there is one debit that ap-

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pears and that is from the cash disbursements book in the amount of \$300 even.

Q. Would you please read the explanation that appears on the books and records of Hollymatic Corporation with respect to that debit?

A. Well, there were checks issued to Mrs. Elizabeth M. Fihe, dated October 18, in the amount of \$25. It seems as though all the checks that were issued on those days were charged to Mrs. Fihe—they were charged to Mrs. Fihe, but it seems as though they were issued to somebody else.

Q. Does your cash disbursements book show a column with respect to the items which were drawn by Elizabeth M. Fihe?

A. That is right, they do.

Q. Were those items posted into the ledger sheet for the personal account of Mrs. Elizabeth M. Fihe? A. They were, sir. [30]

Q. Would you please read from your cash disbursements book the persons to whom the checks were made out which were posted to the account of Mrs. Fihe?

A. A check in the amount of \$50 made payable to Mr. Harry Holly was posted to the account of Mrs. Fihe.

A check in the amount of \$50, made payable to Albert J. Fihe, was posted to Mrs. Fihe.

A check in the amount of \$25, payable to Mrs. Fihe was posted to Mrs. Fihe.

A check in the amount of \$25 to Agnes Holly was posted to Mrs. Fihe.

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A check in the amount of \$50 payable to Albert J. Fihe was posted to Mrs. Fihe.

A check in the amount of \$50 made payable to Harry H. Holly was posted to Mrs. Fihe.

A check in the amount of \$25, payable to Elizabeth M. Fihe was posted to Mrs. Fihe.

A check in the amount of \$25 for Agnes Holly was posted to Mrs. Fihe's account.

Q. What was the total of all of those amounts you just read? A. \$300.

Q. Is there any explanation with respect to those amounts? A. None at all, sir.

Q. Directing your attention to November 30, 1946, what [31] credits, if any, were shown on the personal account of Mrs. Elizabeth M. Fihe?

A. On November 30 there are two debits to the account of Elizabeth M. Fihe: one in the amount of \$750 even; and the other in the amount of \$700 even.

Q. Would you please tell the Court what explanation the books and records show with respect to those items?

A. A check in the amount of \$50——

Q. What book are you reading from?

A. Cash disbursements book, date November, 1946.

A check in the amount of \$50 paid to Mr. A. J. Fihe, charged to Mrs. Elizabeth Fihe. A check in the amount of \$50 paid to Harry H. Holly posted to Mrs. Fihe. A check in the amount of \$25 paid to Mrs. Fihe, posted to Mrs. Fihe. A check in the

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amount of \$25 paid to Agnes Holly, posted to Mrs. Fihe. A check in the amount of \$50 paid to Albert J. Fihe, posted to Mrs. Fihe. A check in the amount of \$50 paid to Harry Holly, posted to Mrs. Fihe. A check in the amount of \$25 paid to Mrs. Elizabeth Fihe, posted to Mrs. Fihe. A check in the amount of \$25 paid to Mrs. Holly, Agnes Holly, posted to Mrs. Fihe. A check in the amount of \$50, paid to Mr. Albert J. Fihe, posted to Mrs. Fihe. A check in the amount of \$50 paid to Harry Holly, posted to Mrs. Fihe. A check in the amount of \$25, paid to Elizabeth M. Fihe, posted to Mrs. Fihe. A check in the amount of \$25, paid to Agnes Holly, posted to Mrs. Fihe. A check in [32] the amount of \$50 paid to Albert J. Fihe, posted to Mrs. Fihe. A check in the amount of \$50, paid to Harry Holly, posted to Mrs. Fihe. A check in the amount of \$25, paid to Agnes Holly, posted to Mrs. Fihe. A check in the amount of \$25, paid to Elizabeth Fihe, posted to Mrs. Fihe; \$50, paid to Albert J. Fihe, posted to Mrs. Fihe; \$50 to Harry H. Holly, posted to Mrs. Fihe; \$25 to Elizabeth M. Fihe, posted to Mrs. Fihe; \$25, paid to Agnes Holly, posted to Mrs. Fihe.

Now, I will have to find that additional \$700: On November 18, a check was issued to Elizabeth M. Fihe in the amount of \$700 with no explanation.

Q. Directing your attention to January 31, 1947, what debits, if any, are shown on the books and records of Hollymatic Corporation with respect to the personal account of Elizabeth M. Fihe?

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A. On January 31, 1947, we have one debit in the amount of \$800, which was posted from the cash disbursements book.

Q. Will you *please to* the Court any explanation that the Hollymatic Corporation has in its books and records with respect to that item?

A. The amount of \$800 derives from a check issued to Elizabeth M. Fihe on January 10, 1947, in the amount of \$800. This is from our cash disbursements book.

Q. Is there any explanation with respect to that, outside of the entry? [33]

A. No, sir.

Q. Directing your attention to March 31, 1947, what debits, if any, are reflected in the books and records of Hollymatic Corporation with respect to the personal account of Elizabeth M. Fihe?

A. There is one entry dated March 31, 1947, which comes from the cash disbursements book in the amount of \$550 even.

Q. Will you please read to the Court any explanation appearing on the books and records of Hollymatic Corporation with respect to that item?

A. Out of the cash disbursements book, dated March 21, 1947, we issued a check payable to Elizabeth M. Fihe in the amount of \$550 even.

Q. Directing your attention to April 30, 1947, what debits, if any, are shown on the books and records of Hollymatic Corporation with respect to the personal account of Elizabeth M. Fihe?

A. For the month of April 30, 1947, there are

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three debit entries in our general journal—excuse me—general ledger, charged to Mrs. Fihe; one of those figures derives from the cash disbursements book and two derive from the general journal book.

Q. What amounts are shown on the books as debits?

A. There is an amount of \$300 from the cash disbursements book. There is an amount of \$1.75 in the general journal, and an amount of \$449.75 in the general journal as of April 30.

There is one other entry here in the general [34] journal in the amount of \$256.25.

Q. Is that in addition to the ones you have mentioned recently? A. That is right, sir.

Q. That is a debit entry?

A. That is a debit entry, yes, sir.

Q. Would you please give the Court any explanation that appears on the books and records of Hollymatic Corporation with respect to these items?

A. The \$300 figure derives from a check issued to Mr. Albert J. Fihe in the amount of \$1000 on April 3rd, \$700 of this amount being charged to A. J. Fihe and \$300 being charged to the account of Elizabeth M. Fihe.

The first journal entry in the amount of \$1.75 is Entry No. 10, dated April 30, 1947, debiting the account of Albert J. Fihe, \$3.50; Elizabeth M. Fihe, \$1.75; Agnes Holly, \$1.75; Harry H. Holly, \$3.50, an unadjusted account because of an unlocated dif-

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ference in the amount of \$4.60. The credit entry is: accrued OAB Tax—Employee, \$15.10.

Explanation: to adjust salaries upon which tax has been paid and not deducted—journal entry in the amount of \$449.75—it is Entry No. 13.

Q. For what date is that entry?

A. That is dated April 30, 1947.

Q. Let me just ask this one question: Had you previously [35] read the explanation with respect to that item of \$449.75 shown as a debit on April 30, 1947, to the personal account of Elizabeth M. Fihe?

A. I have previously read that.

The next entry in the amount of \$256.25, which is a journal entry, has also been reported in the record.

Q. Would you identify that as to date and item number?

A. That is Item No. 37 where we had charged the owners of the building for mortgage and interest on sum paid by the corporation.

Q. The explanation for that item had been previously read into the record?

A. That has been, sir.

Q. Directing your attention to April 30, 1947, what credits, if any, appear on the records of Holymatic Corporation to the personal account of Elizabeth M. Fihe?

A. There are two credit entries entered in our journal, dated April 30, 1947, one in the amount of

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\$875 even and the other in the amount of \$140 even.

Q. Would you advise the Court please, on what date those items appear in your general journal?

A. They appear as of April 30, 1947.

Q. What item number was that entry?

A. That is Item No. 21, which has previously been reported.

Q. That item has previously been read into the record? [36]

A. That is right, sir.

Q. That was for the credit in the amount of \$875?

A. That is right—transfer the advance to officers to the proper accounts.

The next item, in the amount of \$140, was dated April 30, 1947, Entry No. 28.

Q. Has that explanation shown on the books and records of Hollymatic Corporation previously been read into the record?

A. It has been, sir.

Q. Directing your attention to June 30, 1947, what debits, if any, are shown on the books and records of Hollymatic Corporation with respect to the personal account of Elizabeth M. Fihe?

A. There is one entry debited to Elizabeth M. Fihe from our journal record, dated June 30, 1947.

Q. What is the amount of that debit?

A. The amount of that debit is—I am sorry, I gave the wrong amount.

Q. Would you give it—

A. \$408.54.

Q. Would you please tell the Court what ex-

(Deposition of Frank H. Wiscons.)

planation of that amount is shown on the books and records of Hollymatic Corporation?

A. That comes from our cash disbursements book, a check made payable to Elizabeth M. Fihe on June 20 in the amount of [37] \$408.54, check No. 9658.

Q. Directing your attention to September 30, 1947, what credit, if any, appears on the books and records to the personal account of Elizabeth M. Fihe?

A. There is one credit entry as of that date in the amount of \$100 even.

Q. Please tell the Court what explanation appears on the books and records of Hollymatic Corporation with respect to that item?

A. That is Item No. 21, dated September 30, 1947. That is where we had set up the charge to rent on the old building at \$80 per month for five months ended September 30, 1947.

Q. Has that explanation previously been read into the record? A. Yes, it has.

Q. Directing your attention to December 30, 1947, what credit, if any, appears on the books and records of Hollymatic Corporation with respect to the personal account of Elizabeth M. Fihe?

A. There is one credit entry made in the amount of \$60 even.

Q. Please tell the Court what explanation there is for that item on the books and records of Hollymatic Corporation?

A. That was an item on December 31, 1947,

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where we had accrued to rent under the lease agreement; and that has been [38] previously set into the record already.

Q. Directing your attention to January 31, 1948, what debits, if any, appear on the books and records of Hollymatic Corporation with respect to the personal account of Elizabeth M. Fihe?

A. There is one debit entry in the amount of \$120 even, dated January 31.

Q. Will you please tell the Court what explanation appears on the books and records of Hollymatic Corporation with respect to that item?

A. That is an item dated January 31, 1948, debiting officers' salaries \$861.90; debiting Elizabeth M. Fihe, \$120 even; and crediting Mr. A. J. Fihe for \$981.90.

Q. Will you please tell the Court what explanation, if any, appears on the books and records of Hollymatic Corporation?

A. That explanation was read before: to close the balance of Mr. A. J. Fihe's account, charged to A. J. Fihe, salary.

Q. Directing your attention to January 31, 1948, after the debit you just explained of \$120 to the personal account of Elizabeth M. Fihe, what balance, if any, was in that account?

A. There was zero balance at that time.

Q. In what book would be recorded the officers' salaries paid or credited to Mr. Albert J. Fihe during the year 1948?

A. Will you repeat that again?

(Deposition of Frank H. Wiscons.)

(Question read.) [39]

A. The salary paid would be recorded in the subsidiary payroll book.

Q. Do you have that subsidiary payroll ledger with you? A. Yes, I have.

Q. Would you please advise the Court what amount of salary shown for Mr. Albert J. Fihe during the year 1948?

The Witness: Was that 1948?

The Reporter: Yes.

The Witness: The total amount paid to Mr. Albert J. Fihe on the payroll records for 1948 was \$2,061.90.

Q. (By Mr. Levin): Would you please read the period for which each check or each salary was paid and the total amount of the payment?

A. On January 2, 1948, a check in the amount of \$400 was issued to Mr. Albert J. Fihe; January 9, 1948, a check in the amount of \$400 was issued to Mr. Fihe; on January 16, 1948, a check in the amount of \$400 was issued to Mr. Fihe; on January 31, 1948, a check in the amount of \$861.90 was issued to Mr. Fihe.

Q. Were you reading the amount of the check, Mr. Wiscons, or the total amount of salary?

A. That was the total amount of salary.

Q. What deductions would have been taken from that to show what the check was?

A. The deductions for OAB on January 2 were \$4.00. [40] Withholding tax deducted was \$68.90

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a total of \$72.90 in deductions; a net amount of \$327.10.

On January 9, there was a deduction of \$4.00 for OAB tax, \$68.90 for withholding taxes; a total of \$72.90 deducted, getting a net amount of \$327.10.

On January 16, a deduction of \$4.00 for OAB tax, \$68.90 deducted on income taxes; a total deduction of \$72.90; net amount paid, \$327.10. The check in the amount of \$861.90 had no deductions.

Q. Calling your attention, Mr. Wiscons, to your general journal entry of January, 1948, with respect to officers' salaries, would you please look at that entry?

The Witness: What was that date?

(Question read.)

Q. (By Mr. Levin): Would you also look at the subsidiary payroll ledger for the salary of A. J. Fihe for the year 1948?

Now, in your general journal, the entry of December 31, 1947, with respect to officers' salaries, what debit appears there for officers' salaries?

A. \$861.90.

Q. Is there any relationship between that \$861.90 and the one appearing on the subsidiary payroll ledger showing Mr. Fihe's salary for 1948?

Mr. Fihe: If he knows. [41]

Mr. Levin: If he knows, yes.

The Witness: I would not know.

Mr. Levin: Will it be all right with you, Mr. Fihe, if I take about a five-minute break?

Mr. Fihe: No, perfectly all right. I mean, yes.

(Deposition of Frank H. Wiscons.)

(Short recess.)

Q. (By Mr. Levin): Mr. Wiscons, directing your attention to January 22, 1948, specifically with reference to the disbursements record, would you please advise the Court whether checks were drawn on that date for the payment of the option?

A. What was the date?

(Record read.)

A. On that date, there were two checks made payable, one to Harry H. Holly in the amount of \$20,000 even, and a second check to the Southeast National Bank in the amount of \$4,000.

Mr. Fihe: That entry is objected to as absolutely immaterial, incompetent, and irrelevant, and having nothing to do with this case. I move that the answer be stricken.

Q. Directing your attention to the disbursements book with reference to January 20, 1948, do the records reflect any payments on an option on that date?

A. No, sir, I see no record on that.

Q. Do the records of Hollymatic Corporation reflect a [42] mortgage payable on or about December 13, 1947?

Mr. Fihe: Which is objected to as leading.

Q. (By Mr. Levin): Directing your attention to the general journal of Hollymatic Corporation, with specific reference to January 31, 1948, was there an entry made on the record to purchase of patent rights and capital stock on land and buildings from A. J. Fihe under option agreement?

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Mr. Fihe: Same objection—leading.

Motion will be made to strike the answer.

Q. (By Mr. Levin): Do the books and records of Hollymatic Corporation in the year 1947 reflect any mortgage payable accounts?

Mr. Fihe: Let me have the question, please, Mr. Giles.

(Question read.)

Mr. Fihe: Same objection—leading; also irrelevant, incompetent, and immaterial.

Mr. Levin: Would you answer that, Mr. Wiscons?

Mr. Fihe: He can answer that “yes” or “no.”

The Witness: What was that year—1947?

(Record read.)

Q. (By Mr. Levin): I wish to direct your attention—

Mr. Fihe: Pardon me.

There will be an objection to a further question; he [43] has not answered the one preceding.

What was the exact question, Mr. Giles?

(Question read.)

Mr. Fihe: Thank you.

The Witness: Yes, there is some question of a mortgage in the year 1947.

Mr. Fihe: Motion will be made to strike out the answer on the grounds of the preceding objection, and also objection is made to any subsequent testimony regarding the same.

Q. (By Mr. Levin): Directing your attention to the journal entry which you have read into the

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record, dated January 31, 1948, I ask you what reference is made to the mortgage in any entry made on that date?

Mr. Fihe: The objection is repeated.

Mr. Levin: You may answer that.

Mr. Fihe: You are getting all this down?

The Reporter: Yes, sir.

The Witness: January 31, we made an entry in our journal debiting the account of patents, \$45,000, debiting treasury stocks, \$50,000; debiting land \$5,000; crediting option, \$25,000; crediting mortgage payable, \$70,000; crediting A. J. Fihe \$5,000.

The explanation is: to record the purchase of patent rights, capital stock, land and buildings from A. J. Fihe [44] and Elizabeth M. Fihe under option agreement, dated December 13, 1947.

Mr. Fihe: The preceding motion is repeated—namely, to strike out the answer as unresponsive, irrelevant, immaterial, incompetent, and based on a leading question.

Q. (By Mr. Levin): To what book is the mortgage payable item posted?

A. That is posted to our general ledger.

Q. Referring to the general ledger, would you please read the debits and credits contained therein with respect to the mortgage payable account? Will you please read the debits and credits entered therein?

Mr. Fihe: The objection is repeated.

The Witness: Do you wish me to answer that?

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Mr. Levin: Yes, please.

The Witness: We have one credit entry under the account of mortgage payable in the amount of \$70,000, dated January 31, 1948.

Then, we have a debit entry of \$1,750, dated February 29.

Q. (By Mr. Levin): What year was that?

A. 1948.

We have another one dated March 31, 1948, of \$1,750.

We have another dated April 30, 1948, in the amount [45] of \$1,750.

We have another one dated May 31, in the amount of \$1,750.

We have another one dated June 30, 1948, in the amount of \$1,750.

We have another one dated July 31, 1948, of \$1,750.

We have another one dated August 31, 1948, in the amount of \$1,750.

We have another one dated September 30, 1948, of \$1,750.

Q. (By Mr. Levin): Directing your attention to the debit of \$1,750.00 appearing on February 29, 1948, from what source did you get that item?

Mr. Fihe: The objection is made continuing.

The Witness: We received a note from the City National Bank & Trust Company, paying them \$1,750 on the mortgage payable, and \$408.03, interest expense that was paid on——

Q. (By Mr. Levin): Pardon me. I believe you

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did not answer the question. From what source did you get that—from what book of original entry did you get that?

A. I am sorry. From the cash disbursements book.

Q. Would you please read the explanation shown on the cash disbursements journal with respect to that item? [46]

A. On February 18 we made a check payable to the City National Bank & Trust Company, our check No. 10684 in the amount of \$2,158.33.

The explanation is: \$1,750 to apply against the mortgage payable; \$408.33 to be applied to interest expense.

Q. Directing your attention to a \$1,750 debit on March 31, 1948, will you please advise the Court where that is shown on your books and records?

A. That is shown on our cash disbursements book.

Q. Will you please read the explanation?

A. On March 26, 1948, we issued a check in favor of City National Bank and Trust Company, our check No. 107—excuse me, it is 10809; the amount of the check was \$2,034.37; explanation: \$1,750 charged to mortgage payable account, \$284.37 charged to interest expense account.

Q. Directing your attention to April 30, 1948, specifically to the debit of \$1,750, would you please explain to the Court the explanation on the books and records of Hollymatic Corporation as to that item?

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A. That was posted from our cash disbursements book.

Q. Please read the explanation.

A. On April 26, we issued a check in the favor of City National Bank and Trust Company, our check No. 10939, the total being \$2,027.08. We charged mortgage payable for \$1,750; we charged interest expense account \$277.08. [47]

Q. Directing your attention to May 31, 1948, with respect to a debit shown on the mortgage payable account on the books and records of Hollymatic Corporation in the amount of \$1,750.00, would you please explain to the Court the source and explanation of that item?

A. The item of \$1,750 derives from an entry in our cash disbursements book as of May 31.

Q. Please read the entry into the record.

A. On May 26, 1948, we issued a check in favor of City National Bank, our check No. 11083, the amount of the check being \$2,019.78. Of that amount, \$1,750 was posted against the notes payable as a debit, and \$269.78 was posted as a charge to the interest expense account.

Q. Directing your attention to June 30, 1948, respecting a debit which appears on the mortgage payable ledger account of Hollymatic Corporation, in the amount of \$1,750 would you please explain what the books and records show with respect to that item?

A. That derives from a check issued in our cash

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disbursements book in the amount of \$1,750 as of June 30.

Q. Would you please read that into the record as it appears on the cash disbursements book?

A. On June 29, 1948, we issued a check in favor of City National Bank, our check No. 11198, in the amount of \$2,012.50. Of that amount \$1,750 was debited to the mortgage payable and [48] \$262.50 was debited to interest expense.

Q. Directing your attention to July 31, 1948, respecting a debit on the mortgage payable account of Hollymatic Corporation, will you please tell the Court the source and details respecting that item?

A. This is posted from the cash disbursements book as of July 31. The amount is \$1,750. On July 26, 1948, we issued a check in favor of City National Bank, our check No. 11314, the total amount being \$2,005.20. Of this amount, \$1,750 was debited to mortgage payable and \$255.20 was debited to interest expense account.

Q. Directing your attention to August 31, 1948, respecting a debit in the mortgage payable ledger of Hollymatic Corporation, in the amount of \$1,750, will you please explain to the Court the details as they appear on the books and records of Hollymatic Corporation, with respect to that item?

A. That item is posted from the cash disbursements book as of August 31, the amount being \$1,750. On August 30, we issued a check in favor of City National Bank, our check No. 11455, the amount being \$1,997.91. Of this amount, \$1,750

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was posted as a debit to mortgage payable, and \$247.91 was debited to the interest expense account.

Q. Directing your attention to September 30, 1948, regarding a debit shown on the mortgage payable ledger of Hollymatic Corporation, in the amount of \$1,750, will you please [49] explain to the Court the details concerning that item?

A. That is posted from our cash disbursements book, dated September 30, 1948, the amount being \$1,750. There was a check issued in favor City National Bank, on September 24, 1948, our check No. 11578, the total being \$1,990.61. Of this amount \$1,750 was debited to mortgage payable, and \$240.61 was debited to interest expense account.

Q. Are there any other debits appearing on that ledger of accounts?

A. At that time, no, sir.

Q. Directing your attention to the general journal of January 31, 1948, specifically to the entry which has been previously read into the record, referring to the option of \$25,000, where in the books and records of Hollymatic Corporation was that posted?

Mr. Fihe: What was that amount, Mr. Giles?

(Record read.)

The Witness: It was posted in the general journal account as a credit.

Q. (By Mr. Levin): Do the books of ledger account for that item? A. Yes, they do.

Q. Will you please tell the Court what debits

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and what credits appear with respect to that account on the books and records of Hollymatic Corporation? [50]

A. There are two debits in that account: one dated December 19, 1947, which derives from our cash disbursements book in the amount of \$1,000; the other debit is dated January 31, 1948, and that is from our cash disbursements book in the amount of \$24,000 even. There is one credit, dated January 31, 1948, and that is derived from our journal book in the amount of \$25,000 even.

Q. Reference is made to the entry dated January 31, 1948, with respect to a credit appearing on the option ledger account of \$25,000.

Will you please tell the Court the details surrounding that entry?

A. That entry derives from an entry on January 31, 1948. It is on page No. 8, the debit to patents of \$45,000 even; debit to treasury stock of \$50,000 even; debit land, \$5,000 even; credit option, \$25,000 even; credit mortgage payable, \$70,000 even; credit A. J. Fihe, \$5,000 even.

The explanation is: to record purchase of patent rights, capital stock, land and buildings from Mr. A. J. Fihe and Elizabeth Fihe under option agreement dated December 13, 1947.

Mr. Fihe: The answer is objected to on the basis of the previous objection, and also because it is merely a repetition of previous testimony.

The motion is made to strike. [51]

Q. (By Mr. Levin): Your attention is directed

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to an entry appearing to the option ledger account of Hollymatic Corporation, dated December 19, 1947, showing a debit of \$1,000.

Will you please explain to the Court what the books and record of Hollymatic Corporation show with respect to that item?

A. That is an item that has been posted from our cash disbursements book on December 19, in the amount of \$1,000 even. On December 13, a check was made payable to Mr. A. J. Fihe, check No. 10451, in the amount of \$1,000. The explanation is: corporation deposit on option.

Q. Your attention is directed to an entry appearing on the option ledger sheet of Hollymatic Corporation, an entry dated January 31, 1948, reflecting a debit of \$24,000.

Will you please explain to the Court what the books and records of Hollymatic show concerning the details surrounding that item?

A. This item is picked up from the cash disbursements book of \$24,000 as of January 31, 1948. On January 22, 1948, a check was drawn in favor of Harry H. Holly, Check No. 10592, in the amount of \$20,000. The explanation is marked: option.

A check on January 22, 1948, was drawn in favor of Southeast National Bank, Check No. 10593, in the amount of \$4,000 even. The explanation is marked option. [52]

Mr. Fihe: The answer is objected to as a repetition of an answer that has previously been given

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and which was properly objected to at the time. Motion is made to strike.

Mr. Levin: The respondent is finished with his direct examination with respect to this deposition.

Examination

Q. (By Mr. Fihe): Mr. Wiscons, you realize you are under oath here? A. Yes, I do.

Q. You realize also that is a Federal matter?

A. I do that, sir.

Q. Do you know the penalty for perjury?

A. Not fully.

Q. You testified that Hollymatic Corporation was organized in October, about the first of the month, in 1946? A. That is right, sir.

Q. What was the predecessor of Hollmatic Corporation? A. Holly Molding Devices.

Q. Is that the full name?

A. Inc., incorporated.

Q. When was Holly Molding Devices incorporated?

Mr. Levin: To which I have an objection—if he knows.

Mr. Fihe: He seemed to know pretty well when he was testifying on direct.

Can you answer that question?

The Witness: When was Holly Molding Devices—— [53]

Q. (By Mr. Fihe): ——incorporated?

A. I cannot answer. I do not know the answer.

Q. How about Hollymatic Corporation—of what

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state is that a corporation? A. Illinois.

Q. How about Holly Molding Devices—of what state was that a corporation, if you know?

A. Illinois.

Q. You do know that it was in Illinois?

A. I assume that. I do not know.

Q. You were employed by one of these corporations on or about October 1, 1946; is that correct.

A. It was prior to October 1, 1946.

Q. Tell me, do you know what is or was the relationship between Holly Molding Devices, Inc., and Hollymatic Corporation?

A. All I understand is that the name was changed—that is all—from Holly Molding Devices, Inc., to Hollymatic Corporation.

Q. And you say that was about the first of October, 1946 to the best of your knowledge?

A. To the best of my knowledge, Holly Molding Devices or Hollymatic Corporation was incorporated, or originally incorporated in October, 1946, yes.

The name was changed since that time to Hollymatic Corporation—only the name. [54]

Q. In your capacity as comptroller for the present organization, is it your custom or a part of your duties to give Dun & Bradstreet information regarding the financial status of the company?

A. It is, sir.

Q. I show you a document which I am marking for identification as Petitioner's Exhibit 1, and I will ask you to look at that, please.

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(Petitioner's Exhibit Number 1 was marked for identification.)

(Document tendered.)

Q. You have examined the document, Exhibit 1?

A. Yes, sir.

Q. Does your name appear in that document, Mr. Wiscons? A. Yes, it does.

Q. Are you willing to change your testimony with regard to the date of organization of Hollymatic Corporation, in view of that document, Petitioner's Exhibit 1?

A. If you mean on September 25, 1946——

Q. No, I mean a much later date than that with regard to any date around October 1, 1946.

A. The corporation, known as Holly Molding Devices, was incorporated on September 25, or we used the fiscal year 1946. The name "Holly Molding Devices" just changed to Hollymatic [55] Corporation, but there were no rules or anything else that changed excepting the name. That was changed when we moved over to the new building.

Mr. Fihe: Mr. Reporter, will you please read about the first dozen answers of this witness on direct examination, please.

(The record was read as follows:

"Q. By whom are you employed?

A. Hollymatic Corporation.

Q. Where is that located?

A. 433 West 83rd Street.

Q. Chicago, Illinois? A. Chicago, Illinois.

Q. What are your duties with the Hollymatic

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Corporation? A. I am the comptroller.

Q. How long have you been employed as comptroller?

A. I became comptroller of Hollymatic the beginning of 1948—the early months of 1948.

Q. What did you do for the Hollymatic Corporation before that?

A. I was the purchasing agent.

Q. Who had control and custody of the books and records of Hollymatic Corporation during the years 1946 to 1947?

A. My only recollection is Mr. Fihe used to handle the books. [56]

Q. That is Albert J. Fihe who is the petitioner herein? A. That is right, sir.

Q. Are these books and records kept in your control and custody now? A. Yes, sir.

Q. Are these books and records which you brought here, pursuant to subpoena, the books and regular records of Hollymatic Corporation?

A. Yes, sir.

Q. Have you examined the books and records of Hollymatic Corporation for the years 1946 and 1947? A. Have I examined them?

Q. Yes.

A. I looked them over prior to bringing them down here.

Q. Does it appear that they are the books and records that were made in the regular course of business? A. Yes.

Q. Was it the regular course of business to maintain such books and records of Hollymatic

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Corporation? A. Yes, sir.

Q. Would you please tell what books and records were maintained by Hollymatic Corporation?

A. Well, in the years 1946, 1947, they had a cash book, cash receipts, and cash disbursements. I do not recall having any general journal or general ledger at that time; and I think [57] there was a purchase journal and a sales journal.

Q. Mr. Wiscons, when was the Hollymatic Corporation organized?

A. Hollymatic Corporation was organized on October 1, 1946.

Q. Prior to that time what was the company known as?

A. Holly Molding Devices, Inc.

Q. Was it known as such during the years 1946 and 1947?

Strike that.")

Mr. Fihe: That is enough, thank you, Mr. Reporter.

Do we have a question on the record at this time?

(Record read.)

Q. (By Mr. Fihe): Now, Mr. Wiscons, are you willing to change your direct testimony, having heard it read to you? A. No, sir.

Q. Let me remind you that you state, and you have just heard read to you, that Hollymatic Corporation was organized about the first of October, 1946, and that its predecessor was Holly Molding Devices, Inc., both being Illinois corporations.

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That is what you said on your direct. Are you still adhering to that testimony?

Mr. Levin: I object to that question. I think you are mis-stating the direct, personally.

Mr. Fihe: Let the record be read back again, then. [58] Everybody heard what he said on direct.

Mr. Levin: Let us go off the record a minute.

(Discussion off the record.)

Mr. Levin: Personally, I do not believe that the questions on direct indicated that Holly Molding Devices, Inc., was an Illinois corporation.

Mr. Fihe: The only thing that I desire to get from this witness at this time is whether or not he is willing to change his original direct testimony to the effect that Hollymatic Corporation was organized about October 1, 1946, and that its predecessor was Holly Molding Devices, Inc.

Q. (By Mr. Fihe): Are you still standing by that testimony, Mr. Wiscons?

A. I still say Hollymatic Corporation was formed October 1, 1946; but the predecessor was Holly Molding Devices of Chicago, or the name was used at that time. Right now I do not recall what it was.

Q. Will you agree with me that Holly Molding Devices, Inc., was incorporated about October 1, 1946, and that later—possibly sometime in 1948 or 1949, regarding which I know nothing—the name was changed to Hollymatic Corporation?

A. That is right, sir, but I still say Hollymatic Corporation was organized October 1, 1946; but

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that is the name we are using right now with just the name having been changed, no rules or anything else. [59]

Q. Now, we are both agreed that Holly Molding Devices, Inc. was organized about the first of October, 1946?

A. And then the name was later changed to Hollymatic Corporation—I will agree to that, sir.

Q. Now, what was the predecessor of Holly Molding Devices, Inc.?

A. Holly Molding Devices.

Q. What kind of organization was that?

A. A partnership, sir.

Q. Composed of whom?

A. Yourself, Albert J. Fihe, your wife, Harry Holly and his wife.

Q. Thank you.

I will show you another document, that I am marking for identification as Petitioner's Exhibit 2.

(Petitioner's Exhibit Number 2 was marked for identification.)

Q. (By Mr. Fihe): I will ask you read that, please.

(Document tendered.)

Q. Did you note the date of this document?

A. September 30, 1946.

Q. You were employed by the organization at that time, were you? A. I was, sir. [60]

Q. Did you ever see this document before or the original of it?

A. I do not believe that I have.

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Q. Now, do you happen to know how the partnership shares were distributed before the corporation was organized? A. No, sir.

Mr. Levin: There is an objection noted to the question and answer on the ground that this is cross examination and this field is not related to anything gone into or opened up on direct examination.

Q. (By Mr. Fihe): You testified on direct that, from an inspection of the books which you have here, when the corporation was organized it was capitalized at \$20,000; is that correct?

A. That is right, sir.

Q. And that at that time there was a surplus of \$12,000-some-odd dollars; is that right?

A. I believe it was \$12,698.28.

Q. Very good.

Now, you also testified that as of October 1, 1946, there was a liability account in the books charging me, Albert J. Fihe, with \$4,661.49, and charging my wife, Elizabeth M. Fihe, with \$3,461.29.

What do you know about that?

A. I know that it is not correct, because this is a [61] credit; it is not a charge.

Q. Now, when were these entries to which you have testified made?

A. I believe these entries were made when they got the C.P.A.'s to come into the office and try to gather up all the facts.

Q. About when was that?

A. You are pressing my memory, but I would

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say it was in the year 1948, but I will be dog-goned if I remember when.

Q. So that these entries, regarding which you testified and which appear in the books, which you have brought here for this purpose, were not made in those books at or upon the dates therein specified? A. What entries are you speaking of?

Q. All of them.

A. Oh, no, I wouldn't say all of them. The majority of the entries I have read were made at the time of entry. Those are the entries I read and about which I was questioned. They were made at the time of transaction—the journal entries.

I will agree with you some of them were picked up by the auditors, yes.

Q. Who did you testify had charge of the books in 1946? A. I recollect you did, Mr. Fihe.

Q. Did you have anything to do with the books in 1946?

A. Just as a matter of entering some figures on the [62] payroll account.

Q. You testified that you were purchasing agent at that time? A. Right.

Q. Did you have anything to do with payroll accounts? A. No, sir.

Q. Just at random, pick out any entry in the year 1946, regarding which you testified, and let me see it, please—anything.

A. All right, there you are (indicating).

Q. Do you recognize the handwriting?

A. I do.

(Deposition of Frank H. Wiscons.)

Q. Whose is it? A. Irene Jessen.

Q. Do you notice any disbursement to either me or Harry H. Holly during, say, this month of October, 1946?

Mr. Fihe: The witness pointed to some notations in the book.

Q. (By Mr. Fihe): Do they amount to more than \$50 at any time?

A. I have not studied the book that well, Mr. Fihe. These books were asked to be garnered two weeks ago, and I just picked them up and brought them down.

Q. Will you note that in practically all instances where checks were made payable to myself and Harry H. Holly, that [63] checks were also made payable to Agnes Holly, and my wife, Elizabeth M. Fihe? A. Not in all instances.

Q. I said "practically".

A. Practically—I guess, I wouldn't know.

Q. Can you tell me by looking at these books and particularly for the months of October and November of 1946, whether those disbursements included some payroll?

A. Those entries right there have to do with payroll.

Q. Can you tell me this: Whether A. J. Fihe, Harry H. Holly, Agnes Holly or Elizabeth M. Fihe were included in the payroll checks?

A. I can't tell you that; I do not know.

Q. You testified that during 1947, that salaries

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paid to me, Albert J. Fihe, as president of Holly Molding Devices, Inc., were \$25,920.

Mr. Levin: I object to that question. I believe, again, Mr. Wiscons' testimony was as to what the books showed; and he was just testifying as to what was in the books and records of Hollymatic Corporation or Holly Molding Devices, Inc.

Q. (By Mr. Fihe): Do you know for a fact, Mr. Wiscons, that I drew \$400 a week as president of the corporation, and no more?

A. No, sir, I am afraid I do not know that for a fact.

Q. Don't you know for a fact that Harry H. Holly drew [64] \$400 a week as vice-president of the corporation, and no more?

A. I wouldn't know that either, sir.

Q. You have the canceled checks showing that \$25,920, ostensibly, was paid to me during 1947?

A. I do not have them here, sir.

Q. Do you have them at all?

A. It is possible.

Q. Would you mind looking them up? I would like to see my endorsement on any checks over and above or in addition to the salary checks—52 of them at \$400 each.

Mr. Levin: Let the record show that the Respondent has not subpoenaed any cancelled checks from the corporation.

The Witness: I am not familiar with the books, Mr. Fihe. I cannot say anything about what is in the books.

(Deposition of Frank H. Wiscons.)

Mr. Levin: That is not responsive to the question.

Will you please read the last question?

(Record read.)

Mr. Levin: As a matter of fact, I do not believe there is a question pending. There was a statement rather than a question.

Mr. Fihe: I will now ask a question:

Q. (By Mr. Fihe): Mr. Wiscons, you have turned to one page of one of the books from which you have been testifying. I note that the heading on that page includes my name and what was then my [65] Chicago address.

Now, it happens to be for the year 1947 and runs from May 9 of that year to December 26 of that year. Do you see anything in there except records of \$400 per week payments to me as salary?

A. I see one entry made of \$800 on May 9.

Q. Do you know why that was \$800?

A. No, sir.

Q. All of the others are \$400; is that correct?

A. That is right, sir, except the last entry down here of \$11,920.

Q. Where did that come from?

A. I do not know that. I do not know.

Q. And that is in pencil, is it not?

A. That is right, sir.

Q. When was the sheet prepared from which you have been testifying?

A. I'd say back in 1947.

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Q. If I were to say there was no such book in 1947, would you believe me?

A. No, sir, that is my handwriting.

Q. And you made that in 1947? A. Yes.

Q. Whom did you say had charge of the books in 1947?

A. I said I had charge of the payroll records, or posting [66] of payroll records, and you had charge of the books, or Irene Jessen was posting but was told what to post. I think we had an auditor by the name of Mr. Bornstein who told her what to post.

If you are looking for Mr. Harry Holly's page, it is in the back.

Q. Right.

Now, referring to Mr. Holly's payroll account, his salary apparently started also on May 9, 1947, and that was \$800, is that right?

A. I would have to answer it, yes, that is right.

Q. After that it was \$400 a week for four weeks; is that right? A. Right.

Q. And then it dropped to \$200 a week. What was the reason for that?

Mr. Levin: To which I object. That has not been raised on direct examination and it is not proper subject for cross examination.

Mr. Fihe: You may answer, if you know.

The Witness: I'd rather not, because I do not know.

Q. (By Mr. Fihe): You do not know? It is your handwriting; isn't it? A. Yes, sir.

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Q. You do not know why his salary was cut to \$200 a week? [67]

A. I would rather not answer.

Q. You would rather not answer?

A. Yes.

Q. Do you know this is a deposition taken for The Tax Court of the United States, relating to tax matters, and the Tax Court is supposed to know everything in a proceeding such as this?

You know the answer, and I think you can tell me. Do you refuse to answer?

A. Yes, sir.

Q. Do you know that I can bring you into the Federal Court here and make you answer that question?

A. I do not know you could do that.

Mr. Levin: The Respondent wants the record to show that any refusal on the part of the witness to answer is not at the instigation or with the knowledge on the part of the Respondent.

I believe the questions are immaterial and irrelevant. However, the Respondent has not instructed nor does he instruct the witness not to answer.

Q. (By Mr. Fihe): Will you refer to the last accounts of the book entitled "Agnes Holly". Is it a fact that she went on the corporation payroll on June 16, 1947, at \$200 a week?

A. That is what it shows. [68]

Q. That was exactly the same time Mr. Holly's salary was cut to \$200 a week; is that correct?

A. Yes, sir.

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Q. And that state of affairs continued until November 21, 1947; is that right?

Mr. Levin: I object to the question on the ground of immateriality and on the ground that the question was not raised on direct examination.

Mr. Fihe: The witness has testified from these books. I do not want to burden the Court with the books, and I do not want to burden the corporation with the necessity of providing the books in court.

I do want to show what the records show, and I believe that the witness has admitted that that is what the records show.

Q. (By Mr. Fihe): Now, did you see Mr. Harry H. Holly around the offices of Holly Molding Devices, Inc., at any time between June 13, 1947, and November 21, 1947?

Mr. Levin: I object to the question on the ground it is immaterial and has nothing to do with the issues on trial.

Mr. Fihe: You can answer that question.

The Witness: I do not remember.

Q. (By Mr. Fihe): If I told you that Mr. Harry Holly was in the Federal [69] penitentiary serving a term for attempted income tax evasion during that period of time, would you agree that that was correct?

A. I would not agree on the time. I know he did, but I do not remember the time.

Q. Do you know Mr. Holly's signature?

A. Fairly well, sir.

Q. I show you four documents which I have

(Deposition of Frank H. Wiscons.)

marked for identification as Petitioner's Exhibits 3, 4, 5, and 6, respectively.

(Petitioner's Exhibits Numbers 3, 4, 5 and 6 were marked for identification.)

Q. I ask you to state if you recognize any of these signatures on those documents?

(Documents tendered.)

A. I am not a handwriting expert, but it does look like Harry's signature.

Q. You testified that there was a credit to me, Albert J. Fihe, in 1947 of \$10,706.20, according to the books which you have here before you.

Do you have any record that I ever got that money?

A. That account was cleaned up—Albert J. Fihe's account—on the date as to which he examined before and that amount was included in that group.

Q. What date are you talking about?

A. Your account was at zero balance as of January 31, 1948, and that figure of \$10,706.20 was credited to you on [70] April 30, 1947. That was merely a bookkeeping transaction.

Q. That is right, sir.

It was not done on April 30, 1947, either, was it?

A. I do not remember, sir.

Q. Now, you have testified that on March 31, 1947, I was debited in the amount of \$800; and you further testified that there was no explanation that you could give for that amount.

Mr. Levin: I object to that question. The witness

(Deposition of Frank H. Wiscons.)

was not testifying; he was just reciting what was in the books and records of the Hollymatic Corporation.

Q. (By Mr. Fihe): If I told you I never got that \$800, and there was no reason to charge me for that \$800, would you believe me?

Mr. Levin: I object to that question. I think it is being placed on a personal basis,——

The Witness: I wish you would not do that, Mr. Fihe.

Mr. Levin (Continuing): ——and I think the question should be to the witness as to whether or not he knows such facts occurred or whether the books so reflect, rather than trying to place it on a basis where he will be on the spot.

The Witness: According to the books, I stated a check was issued March 31, in the amount of \$800; and it was made payable to Albert J. *Fee* on March 17, with no explanation as to why it was drawn.

Q. (By Mr. Fihe): Do you have that cancelled check? A. I do not know.

Q. You also testified that there were some more checks apparently made payable to me, Albert J. Fihe, in the amount of \$700, another \$700, and \$2,325, dated April 30, 1947; and you further said there was no explanation for those checks.

Do you have those cancelled checks?

A. I do not know, sir.

Q. You further stated there was an item of \$3,000 on that same day, April 30, 1947, which an

(Deposition of Frank H. Wiscons.)

explanation that it was a loan to me from the corporation.

A. That is what the books say.

Q. You do not know anything about that yourself? A. No.

Q. If I told you I never got a nickle from the corporation in the way of a loan and all I ever did was lend them money, would you believe me?

Mr. Levin: I object to the question, on the ground that it is too personal and that it is not a question of getting a conclusion from the witness, but rather a question of what the facts are.

Q. (By Mr. Fihe): Would you care to answer that question?

A. I would not want to answer it.

Q. Do you know anything about the insurance loans we were [72] presumed to get from the company? There were some entries on that same fatal date of April 30, 1947, relating to some policy holders, Bureau Insurance loans.

Do you know for a fact that either Mr. Holly or I ever borrowed any money on insurance and charged that to the company?

A. I do not know that for a fact, no, sir.

Q. Now, there is an item here of rent, and it was apparently either charged or disbursed, depending upon whether it was mortgage or whether it was rent, to the four of us—Harry Holly, Agnes Holly, myself, Albert J. Fihe, and my wife.

Who owned that building upon which this rent was paid?

(Deposition of Frank H. Wiscons.)

A. Which building was that—the two-storied building or the smaller building?

Q. The one upon which rent was paid.

A. I presume the four of you owned that building. I presume that.

Q. Do you know when that building was bought?

A. No, sir. I do not.

Q. Do you know that that building was bought by a partnership consisting of the four of us?

A. No, sir, I do not.

Q. You testified that there was another item on that same date, April 30, 1947, totalling \$1,499.50, which was charged to the four of us and identified as unauthorized salaries. [73]

Do you not know for a fact that those were merely partnership withdrawals in the early part of 1946?

A. Don't I know that for a fact?

Q. I am asking you.

A. I do not know that answer.

Q. Now, there are some charges to me for some apparent payments on a patent purchase contract. Do you have the original or a copy of that alleged patent purchase contract?

A. I believe I have.

Mr. Levin: If you have——

Mr. Fihe: May I see it?

(Document tendered.)

Mr. Fihe: You have handed me a document which appears to be a carbon copy entitled, "Installment Purchase Agreement."

(Deposition of Frank H. Wiscons.)

Do you see any signatures on that document?

The Witness: Not on that one.

Q. (By Mr. Fihe): Do you have one with any signatures on it?

A. Not with me, sir, not here.

Q. Do you have it at all?

A. I do not have it, sir.

Q. Is it anywhere in existence that you know of?

A. Yes, sir.

Q. It is? A. Yes, sir. [74]

Q. Could you produce it for my inspection?

A. Not today any more.

Q. At some time convenient and satisfactory to both of us?

Mr. Levin: I object to this interchange. This is a legal action. We are not trying to work in some private inspections. The powers of subpoena are open to the Petitioner, and I think if he wants to subpoena the documents on his own, he can very well do so.

Q. (By Mr. Fihe): You testified regarding a charge to me on May 8, 1947, in the amount of \$2600.

Don't you know for a fact that that was money I gave Mr. Holly in order to assist him to pay his legal fees when he was defending himself or being indicted for an attempted income tax evasion?

A. I was not handling the books at that time. I do not know.

Q. Weren't you the comptroller in May of 1947?

(Deposition of Frank H. Wiscons.)

A. They gave me the title, but I did no accounting at the time. I believe that was the date—I do not know. I do not even know if that was the date.

Q. You also testified that June 30 of 1947, there was a charge against me in the amount of \$3,632.05 with no explanation whatsoever. [75]

Do you know whether I ever got that money?

A. The check was made payable to yourself, sir.

Q. Do you have the cancelled check with my endorsement? A. I do not know.

Q. You also testified that there was a charge to me of \$250 on September 30, 1947, and you stated that that was for insurance not for the company,—

Mr. Levin: I object.

Q. (By Mr. Fihe): (Continuing) —according to the books and records which you have here.

I show you a document which I shall mark for identification as Petitioner's Exhibit No. 7.

(Petitioner's Exhibit Number 7 was marked for identification.)

Q. Do you recognize the signature on that document?

A. It looks like Mr. Harry Holly's signature.

Mr. Fihe: Do you want to see that, Mr. Levin?
(Document tendered.)

Q. (By Mr. Fihe): You testified that there was a check made to me on December 19, 1947, which was an option payment in view of a contract whereby Mrs. Fihe and I would sell our stock.

Do you know how long that option was to hold?

(Deposition of Frank H. Wiscons.)

A. Will it be all right if I read it? I do not know [76] offhand.

Q. Take a look.

Mr. Levin: I will object to that question on the ground that the direct examination confined itself to the books and records and what appeared thereon; and that it is not a proper subject of cross examination.

The Witness: I do not know the answer to your question—I do not know.

Q. (By Mr. Fihe): If I told you that it expired in 30 days, and that I voluntarily allowed them to re-open, would you believe me?

Mr. Levin: I object to the question on the grounds heretofore stated. This has no bearing on the direct examination and is not a proper subject of cross examination.

Q. (By Mr. Fihe): Do you want to answer?

A. I would not know, Mr. Fihe.

Q. Now, there is a charge against me on approximately December 19, 1947, for \$2,292.36, and you admitted the books showed there was no explanation whatsoever.

Do you have that cancelled check with you?

A. Not with me, no, sir.

Q. Do you think you can find it?

A. It is possible.

Q. If I told you I never got that money, would you believe me? [77]

Mr. Levin: I object to the question on the ground it is too personal, and on the further ground

(Deposition of Frank H. Wiscons.)

that it has no bearing on the case as to what Mr. Wiscons believes. It is the facts that control.

Q. (By Mr. Fihe): I believe you testified that your records showed I was paid three weeks salary in the beginning of 1948 at \$400 a week, amounting to \$1200. Then you went on to testify that your records showed there was a further charge against me of \$981.90; and it was charged for salary.

Can you explain how—when I resigned as president of the corporation as of the first 3 weeks of 1948—how I drew any more salary after that, having completely severed my connection with the corporation?

A. I do not know how you could have drawn any more.

Q. You did testify that that check distinguished itself from the others, because there was no withholding or any other kind of tax deduction from it?

A. As I recall, that is right.

Q. And the first three had some withholding and some other tax deductions, and this had none. That is what you said; right?

A. Yes.

Q. You do not know what happened to the \$981?

A. Yes, sir, it was credited to your account.

Q. Did I ever get it?

A. When we closed out your account, it was included.

Q. If I told you I never got that, would you believe me?

Mr. Levin: To which I object on the ground that

(Deposition of Frank H. Wiscons.)

it is too personal in nature, not proper cross examination and the facts speak for themselves.

Q. (By Mr. Fihe): Let us talk about Mrs. Fihe's account: You testified way back in October 31, 1946, there was a \$300 charge to her account, but checks were issued to other people, including myself.

Would you agree with me that I owe my wife at least \$100 of that?

Mr. Levin: I object. That calls for a conclusion on the part of the witness.

The Witness: I would not answer.

Q. (By Mr. Fihe): As far as your books show, she never got that money, did she?

A. As far as the books show, that is true.

Q. She did not get it from me or either one of the Hollys? A. As far as the books show.

Q. There is another entry on October 30, 1946, which included \$1450 charged to her and, as you testified there were several entries of \$50, \$25, \$25, certain of which were apparently paid to me. In fact, five \$50 items. Will you agree with me [79] that I now owe my wife \$250?

Mr. Levin: I object to the question. It calls for a conclusion of the witness.

The Witness: I would not know you owed her, no.

Q. (By Mr. Fihe): As far as the books show, she never got it?

A. As far as the books, that is right.

(Deposition of Frank H. Wiscons.)

Q. She never got it from either one of the Hollys?
A. As far as the books go.

Q. Now, there is a debit to her on January 31, 1947, apparently a check issued on January 10 of that year in the amount of \$800. You admitted there was no explanation for it.

Do you have that cancelled check endorsed by her?
A. I do not know, sir.

Q. How about the one item of \$550, dated March 21, 1947, charged to her account on March 31, 1947?

Do you have that cancelled check?

A. I do not know.

Q. You stated that there was no explanation on the books for that amount, did you not?

A. I do not remember about that.

Q. If I tell you you did, will you believe me?

Mr. Levin: I object. The record will show what was said. [80]

Q. (By Mr. Fihe): Now, on April 30, 1947, there appears an entry on a check given me in the amount of \$1000, and \$700 of that was charged to me and \$300 charged to my wife.

Is there any explanation?
A. No, sir.

Q. Do you have those cancelled checks, endorsed by either one or both of us?

A. I might have.

Q. Would you mind trying to find them for me?

A. I will look.

Q. Do your records show I received any salary in 1946, either from the corporation or the partnership?

(Deposition of Frank H. Wiscons.)

A. Those records were not subpoenaed. I do not have them here with me.

Q. 1946?

A. I do not have them here with me.

Mr. Fihe: That is all of the cross examination.

Examination

Q. (By Mr. Levin): Just one item to clear up, Mr. Wiscons. I believe you testified that you had no explanation for \$11,920 appearing on the officer's salary ledger sheet for Mr. Albert J. Fihe; is that correct.

A. That is on the payroll account.

Q. On the payroll account; is that right?

A. Yes, sir. [81]

Q. Now, on direct examination you read into the record a journal entry of April 30, 1947, showing that item; is that right?

A. Yes, I have that item on April 30.

Q. That item is in the amount of how much?

A. \$10,706.20.

Q. Where was that posted from?

A. From our general journal.

Q. Would you again read the general journal item, please?

A. The general journal item reads, Journal No. 12, dated April 30, 1947, charging or debiting executive's salary \$23,840; credit above O.A.B. Tax—employee, \$85; credit employees' income taxes withheld, \$2444.60; credit Albert J. Fihe, \$10,706.20; credit Harry H. Holly, \$10,604.20. The explanation

(Deposition of Frank H. Wiscons.)

reads: to set up executives' salaries, accrued but not paid for 7 months ended April 30, 1947.

Q. Was that posted in the subsidiary ledger account showing the payroll? Was that posted in the subsidiary ledger account showing the salary to Albert J. Fihe for the year 1947?

A. It was, sir.

Examination

Q. (By Mr. Fihe): Your accountants made the entries, did they not?

A. Not the payroll entries.

Q. No, I mean that last thing—this \$11,000 in the ledger?

A. The accountants had, I believe, given us the entries [82] to make.

Q. And they are just in pencil at the bottom of that page?

A. On this one here (indicating).

Mr. Levin: Let us identify the book.

Mr. Fihe: I am talking about my own page with my name at the top showing payroll checks.

The Witness: That is my writing.

Q. (By Mr. Fihe): It is in pencil?

A. Yes.

Q. Who told you to do that?

A. It was set up from the general ledger book to the payroll book.

Q. Who told you to do that?

A. I would assume the accountants at that time. No one else knew anything about it, outside of yourself and Mr. Bornstein.

(Deposition of Frank H. Wiscons.)

Q. Who was the accountant?

A. Barrow, Wade & Guthrie.

Q. You mentioned Mr. Bornstein. He was your auditor in 1946 and early 1947, was he not?

A. If you can call him an auditor. He used to come in and check the books. I do not know.

Q. Don't you know he went to the penitentiary for attempted income tax evasion?

Mr. Levin: I object on the ground that the question [83] is immaterial and irrelevant.

The Witness: I believe I heard of it.

Mr. Fihe: That is all I have.

Mr. Levin: That is all.

(Which were all of the proceedings had in the above-entitled matter.)

/s/ FRANK H. WISCONS. [84]

[Endorsed]: T.C.U.S. October 28, 1955.

[Title of Tax Court and Docket Nos. 52394, 52396.]

TRANSCRIPT OF PROCEEDINGS

Court Room 9, U. S. Post Office and Court House Building, Los Angeles, California, November 28, 1955—2:00 p.m.

(Met, pursuant to notice.)

Before: Honorable Norman O. Tietjens, Judge.

Appearances: Albert J. Fihe, 1671 Casale Road, Pacific Palisades, California, appearing for and on

behalf of the Petitioners. Mark Townsend, Office of Commissioner of Internal Revenue, 1135 Subway Terminal Building, Los Angeles, California, appearing for and on behalf of the Respondent. [1]*

Proceedings

The Clerk: Docket Nos. 52394 and 52396, Albert J. Fihe and Elizabeth M. Fihe. Will you please state your appearances for the record?

Mr. Townsend: Mark Townsend, for the Respondent.

Mr. Fihe: Albert J. Fihe, for the Petitioners.

Mr. Townsend: Your Honor, I have a motion to amend the answer. Would you care for me to go into that at this time or after the opening statements?

The Court: After the opening statements.

Mr. Fihe: If the Court please, I understand that you would like at least a short opening statement so that you may be apprised of some of the facts upon which the Petitioner relies.

The Court: Well, that Mr. Fihe, and could you define the issues and see if there are some that can be resolved?

Opening Statement on Behalf of the Petitioners
by Mr. Fihe.

Mr. Fihe: It may sound something in the order of a story, but I believe that the Court will comprehend the facts upon which we are relying, if I just present it in the form of a story to start with. I am

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

a patent lawyer by profession and every once in a while, I have a client coming in who has some kind of an invention which looks as though it may have promise, and more often than not, the client has no money.

In some of these cases, I take it upon myself to try [3] to get the man a patent and help him promote the invention by manufacturing or selling or helping him by doing so.

In this particular case, it happened that in about 1936, this party, by the name of Harry Holly, came to me and he had invented a new machine for making hamburger patties for use in making the ordinary hamburger buns. It was a better machine, a better sanitary method, so I agreed with him to try to get him a patent and if it was fairly good, we would try to manufacture those machines and sell them. That was in 1936.

We went ahead with that and the patent application was allowed and looked good, so we entered into an agreement, a partnership, just he and I, and it was on a fifty-fifty basis, the partnership.

He was to do the work on the machine. He assigned a half interest in the patent to me and I agreed to put up \$1,000.00, rented a little place and got him started. Well, that \$1,000.00 did not last very long, and we will prove, your Honor, that during the next five years, Mrs. Fihe and I continued to put money into that business to keep it going because we still had some faith in it, and we put in about \$35,000.00.

We got the patent and for a long time it looked

as if we had nothing. We could not sell the machines. We could not even give them away. I know, because I tried myself. But finally they began to take hold and even then we did not make any money. It was a matter of putting even more money into it [4] and in 1940, 1941 and 1942, as we will prove, your Honor, we put additional sums, approximately about \$12,000.00 into that partnership, and at that time, your Honor, there were just the two of us, Harry Holly and myself.

However, as time went on, and as we will prove, my wife put quite a bit of her own money into that business, so on January 1, 1945, we organized a partnership which included Holly's wife, Agnes Holly and of course, my wife, Elizabeth M. Fihe.

That four party partnership continued until about October 1st of 1946, and we operated under the same name as originally used, namely, Holly Molding Devices and that molding was spelled "M-o-l-d-i-n-g". There had been some previous partners which doesn't mean much, because they were just limited partners, but when we organized the four party partnership, it was, as we will show, a bona fide partnership.

The Commissioner contends that it was not a partnership and that is the bone of contention. Another point in question is that we did not put into it that much money and we will try to prove that we did.

After the corporation was organized on October 1st, 1946, it went on for a while. I was president, Mrs. Fihe was treasurer, Harry Holly was vice

president and Agnes Holly, his wife, was secretary.

Then a disagreement occurred — that will probably [5] come up in the course of the trial—finally, we agreed to sell our interest in the stock and the sale of that was arranged, I think, about the 1st of March of 1948. I am just relying on my memory there. And we sold out for \$100,000.00.

Even then the company did not have much money and we took notes.

The Court: When you say you “sold out”, what do you mean?

Mr. Fihe: We sold our stock in the corporation, your Honor.

The Court: Stock?

Mr. Fihe: Yes. We got \$24,000.00 cash and my wife got about \$970.00 a month and I got about \$780.00 a month plus interest until the notes were all paid.

That point is another on which we are having quite a disagreement. The respondent here contends that in as much as Mrs. Fihe and I got \$24,000.00 cash when we sold our stock and that we then proceeded to get, starting I think on the 1st of March, about \$1,750.00 per month, that that consummated a complete sale during the year of 1948 and that, therefore, we were compelled to pay tax on that as a capital gain all in one year.

We shall prove, your Honor, that the notes which we obtained and which were payable in that year, payable to the individual and definitely omitted the words “or order”, “o-r [6] o-r-d-e-r”, and therefore, were not negotiable notes. Neither Mrs. Fihe

or I could have obtained one penny on those notes by trying to borrow on them. We did not because we knew we could not. We just hoped that they would be paid when they became due and which they were.

Now, that is another point which is here before the Court. Are we compelled to pay that tax on the capital gain all in one year, or is that tax to be paid as we collected the money, and in that connection, there is a correlary. The Government contends that we only put about \$20,000.00 into that business, for which we got \$100,000.00 when we sold out twelve years later.

We contend that, for the first seven or eight years, we continued to pour money into it and probably put almost \$50,000.00 into it. We contend reasonably that we invested \$35,000.00 in the first five years and that, therefore, we should not be taxed on more than a \$60,000.00 profit. And I believe that is reasonable.

You cannot make \$100,000.00 out of \$2,000.00 or \$10,000.00 or even \$20,000.00 in twelve years.

Then, as a point, regarding the actual returns, the usual contention is that we deducted too much for that and too much for this and too much in the way of contributions and too much in the way of medical expenses, and too much in the way of traveling expenses, advertising and so on. [7]

Now, I kept pretty fair books and I think we can substantiate practically all of those deductions and in that connection, your Honor, I went to Chicago, where we lived at that time, and came out here in

1948, after we sold out, I went to Chicago and took all my records. I shipped them there, practically a trunkful and worked with the Income Tax agents in Chicago, because the Holly books were there too, for one solid week. I was over there every day and they even began to think that I was on the payroll. And I worked with those gentlemen and I thought we had arrived at a very fair determination of the issues and agreed to it verbally, but then when the report came in a couple of months later, they had backtracked on a great deal of the items upon which I thought we had agreed, and upon which we had agreed verbally, and I wasn't very happy about that, and therefore this protest.

I believe that will give your Honor a fairly good idea of the question here presented and the rest of it will probably come out as we go along.

Opening Statement on Behalf of the Respondent
by Mr. Townsend.

Mr. Townsend: If the Court please, this proceeding involves deficiencies in income tax and negligence penalties for the years 1946, 1947 and 1948. The year 1949 is also involved, since there is a net operating loss carried back from that year to 1947. As Mr. Fihe said, some time in 1937, he and Mr. [8] Holly formed a partnership known as the "Holly Molding Devices" located in Chicago, Illinois, for the purpose of manufacturing hamburger molds.

Now, on or about September 25, 1946, the partnership was incorporated under the name of "Holly

Molding Devices, Inc.'" Now, all the assets and liabilities of the partnership were turned over to the corporation in exchange for capital stock, except for certain real estate and buildings which was apparently distributed to the individuals just prior to or at the same time, and were apparently rented by the individuals to the corporation.

Mr. Fihe was made the president of the corporation as he stated. In January of 1948, pursuant to an option agreement entered into during the previous month, Mr. and Mrs. Fihe sold all their interest in the corporation to the corporation. This interest consisted of capital stock, patent rights, land and a building.

He had actually received \$1,000.00 the previous month as a payment on the option and \$24,000.00 in January of 1947, so they received \$25,000.00 in cash, a credit of \$5,000.00 to Mr. Fihe's account, his personal account, offsetting a debit balance in that account plus two notes that they received totalling \$70,000.00 and a chattel mortgage securing these notes and covering all the machinery and equipment owned by the corporation. [9]

Payments of \$1,750.00 a month on the principal plus interest were made as Mr. Fihe mentioned, between he and his wife.

Now, early in 1948, Mr. and Mrs. Fihe moved to Los Angeles and established their home here. During all the years involved in this case, Mr. Fihe was engaged in the practice of patent law. He had apparently a law office in Chicago and also a law office in Los Angeles.

Also, in 1948 and thereafter, Mr. Fihe was engaged in the manufacturing business here in Los Angeles with his own factory which manufactured fishing equipment. Separate returns were filed by the Petitioners in 1946 but joint returns were filed for all the other years that are involved.

Now, the issues that are involved in this instant case on a year to year basis are as follows:

In 1946 we have the family partnership issue, in which the Respondent has not recognized Mrs. Fihe as a bona fide partner in the Holly Molding Devices partnership for the year 1946. That is the only year that she was involved, your Honor.

Further, in that year, Respondent determined that there was net income received from the Los Angeles law office rather than a loss as reported, and that deductions for legal expense and travel expense were overstated.

A carry back loss from 1948 was claimed by the [10] Petitioners or claimed by Mr. Fihe and was also eliminated due to a determination that 1948 was an income rather than a loss year.

In 1947 Respondent has determined that Petitioners understated income received from the Holly Molding Devices, Inc., by some \$10,000.00. The ninety day letter sets forth the understated income as representing dividends of some \$8,890.00 and royalties of \$1,166.57. The proof may show that this is a misnomer, as far as items are concerned, that is, that the understatement may consist of salary, dividends and/or royalties. The classification may be incorrect.

It is the Respondent's position, however, that the items represent income, regardless of their classification and Respondent requests the Court for leave to amend the pleadings to conform to the proof, as far as classification of these income items are concerned, if that is necessary to conform to the proof, as far as the mere classification of these items is concerned.

The remaining issues for that year are the partial disallowances of page 3 deductions claimed for contributions and taxes.

In 1948, the Respondent has determined that Petitioners understated income from the Holly Molding Devices, Inc., in the amount of \$861.90. Also in that year, some thirteen categories of business expenses were disallowed. An [11] addition of \$280.45 in receipts from law practice was determined. There was also partial disallowance of page 3 deductions claimed for contributions, casualty loss and medical expense.

There was also increased capital gains — an increase in capital gain. This comes about by the disallowance of losses claimed on the sale of personal residences and personal furniture; the inclusion of the full sales price received from the sale of stock, patent rights, land and building to the Holly Molding Devices, Inc., and a reduction in the basis claimed on such sale.

Mr. Fihe contends that he is entitled to either the deferred payment method or the installment payment method. I may state here that Mr. Fihe claims to have invested all this money in the partnership

since the assets and liabilities of the partnership were transferred to the corporation and loan accounts were set up by the corporation.

In other words, the corporation assumed the loss due to these Petitioners and apparently the outstanding liabilities were taken care of.

In 1949 the issues are the partial disallowance of some ten categories of business expense and the determination that receipts from law practice were understated.

Also, in that year, the disallowance of page 3 deductions claimed for contributions, taxes and interest. The [12] issue of negligence penalties is involved for 1946, 1947 and 1948. It is Respondent's position that the negligence penalties should attach in this case for the following reasons, your Honor.

As the proof will show, the Petitioners decided—deducted personal withholding taxes in 1947 as a page 3 deduction. That was over \$6,000.00 of those taxes that they deducted for personal expenses, such as moving expenses from Chicago to Los Angeles in 1948 as a business expense. Not only was this claimed as a business expense but it was claimed twice, once as freight expense and again as travel expense.

Mr. Fihe also deducted the cost of maintaining his family in a hotel after moving to Los Angeles in 1948 as travel expense of his business.

He deducted the losses sustained from the sale of two personal residences and furniture in 1948. He failed to report all the income received from the Holly Molding Devices, Inc.

He claimed duplicate deductions, including a deduction for taxes, in the amount of \$3,511.44 which was claimed as a page 3 deduction and also as a business expense on the 1949 return; also a deduction for interest in the amount of \$3,909.95 which was claimed as a page 3 deduction, and also as a business expense on the 1949 return.

And although he carried on a law practice in Chicago [13] and a law practice in Los Angeles and was also engaged in the manufacturing business, from which businesses large amounts of gross receipts were derived, Mr. Fihe failed to keep adequate or sufficient records of such businesses.

No books of account were maintained whatsoever. In fact, the only records were maintained on check book stubs and we have seen no accounts or books.

Mr. Fihe is an attorney with a large law practice and certainly cannot plead ignorance of the law as any mitigation or excuse of his negligence.

The Respondent would also like to point out with respect to the disallowance of expenses, that this is not a case where the expenses claimed have been disallowed in toto as unsubstantiated. In most instances the expenses claimed were allowed in part and the portions disallowed represented duplications, personal items, unallowable deductions, and a few unsubstantiated items.

In other words, there has been an audit in this case and Respondent has already applied the rule of the Cohan case.

Now, in Respondent's determination, Mr. and Mrs. Fihe reported in 1949 some \$21,000.00 as pro-

ceeds from the sale of their stock and other interests in the corporation. It is in compliance with this determination that the sale was completed in 1948 and eliminated from the report by the petitioners in 1949. The result of that elimination was a [14] net operating loss for that year which Respondent as allowed as a carry back to 1947.

Now, if the Court should determine that the Petitioners are correct in their contention, that they are entitled to deferred payment treatment or instalment payment treatment, that income should properly remain in 1949, which would have the effect of reducing or eliminating the net operating loss carry back to 1947 and would result in an increased deficiency for 1947.

It is purely a mathematical matter, but in order to protect itself and its interests, respondent would like to amend its pleadings to assert in the alternative that portion, that there would be an increased deficiency.

The Court: That is, in the event it should be decided that the Petitioner is allowed to defer payments. Have you any objection to that, Mr. Fihe?

Mr. Fihe: None, your Honor. I have no objection to the amendment.

The Court: The amendment will be received and if it necessary to file a——

Mr. Fihe: There are one or two points which counsel has mentioned. He stated that the records of Holly Molding Device show that I got \$10,000.00 that we never reported. I would like to say that I

would like to see that \$10,000.00 myself. We did not get it. [15]

He also stated that the records of Holly Molding Devices show that I received, in the first two or three weeks of 1948, \$861.00. I absolutely have no record of that. In fact, instead of getting \$100,000.00 when we sold out, the sum of \$5000.00 was arbitrarily taken on the basis that we owed the company some money, so we just lost \$5,000.00 in that deal.

But there was quite a bit of tension at that time and rather than have any more argument or fighting about it, we just waived our claim to what we should have had, that other \$5,000.00.

Now, as to our business expenses, I believe that an attorney moving his practice from one city to another is entitled to moving expenses. We made a complete move. We just pulled up our roots and moved out here. It cost me a lot to move out here. When we sold our property back there, we sustained losses and those losses are deductible.

The Court: You mean losses on personal residence property?

Mr. Fihe: Yes and of course, we sold what business property we had there but that was included in the transfer of the stock which was owned by the corporation. We sold our stock in that.

Now, if the Court please, I would like to ask Mrs. Fihe to take the stand and we will proceed with our proof, [16] your Honor.

The Court: All right.

The Clerk: Will you tell us your name, Mrs. Witness, please?

Mrs. Fihe: Elizabeth M. Fihe.

Whereupon,

ELIZABETH M. FIHE,

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Q. (By Mr. Fihe): You have stated your name as Elizabeth M. Fihe? A. Yes, I have.

Q. What is your residence address?

A. 1671 Casale Road, Pacific Palisades.

Q. How long have you resided in California?

A. Since August, 1948.

Q. Where was your residence in the years 1946 and 1947 and the first part of 1948?

A. In Chicago, Illinois.

Q. You are one of the petitioners in these two dockets, Nos. 52394 and 52396? A. Yes, I am.

Q. You are joined with me as your husband in these matters? A. Yes. [17]

Q. What was your occupation when you were living in Chicago from 1945 until approximately the beginning of the year 1949?

A. I was a partner in a business located in Chicago known as Holly Molding Devices.

Mr. Townsend: I move to strike the answer as a conclusion.

The Court: Objection sustained. May I have that answer read back, please?

(Testimony of Elizabeth M. Fihe.)

The Reporter: Yes, your Honor.

(Answer read.)

The Court: She gave her occupation as being a partner in the Holly Molding Devices. I think that would depend on the facts that you develop. It is a conclusion, Mr. Fihe.

Mr. Fihe: I don't know about that. She ought to know what she was doing in those years.

The Court: Well, whether or not a person is a partner would have to be shown by more than her own statement that she was a partner.

Mr. Fihe: Well, we will go a little further into the proof then.

Q. (By Mr. Fihe): Do you know what happened to the partners of the Holly Molding Devices in the year of 1946? [18]

A. I know it was incorporated in the State of Illinois, yes.

Q. And what was the name of the corporation?

A. Holly Molding Devices, Inc.

Q. Were you an officer in that company?

A. I was.

Q. What office did you hold?

A. Treasurer.

Q. And did you have any stock in that corporation?

A. Yes, I did.

Q. Do you know how many shares of stock were in the corporation?

A. There were two hundred shares of stock.

Q. Par value? A. \$100.00.

Q. How many shares did you own?

(Testimony of Elizabeth M. Fihe.)

A. Fifty shares.

Q. And how did you happen to own fifty shares of the stock in Holly Molding Devices Inc.?

A. Well, because I had invested money over a period of years in it.

Q. In what?

A. In the Holly Molding Devices, from the beginning, and continued on and I also——

Q. What was Holly Molding Devices? [19]

A. It was a partnership.

Q. Now, just what did you do when the partnership known as Holly Molding Devices was in existence—you, yourself—what did you do?

A. I, myself, worked in the business and my work consisted of checking the required supplies, ascertaining prices on various parts of machinery, ordering supplies, receiving orders for machines, seeing that they were properly billed and shipped, preparing the material to be distributed among the restaurant owners and restaurant supplies and I also attended various restaurant supply shows that were held in various cities of the United States, including New York, Chicago, and Boston.

Many of those shows lasted for ten days and went on from 11:00 in the morning until 11:00 at night.

Q. And what did you do at those shows?

A. I demonstrated the machine, talked to the restaurant owners about their problems, gave them descriptive literature, quoted prices to the distributors and gave general information concerning the molding machine.

(Testimony of Elizabeth M. Fihe.)

Q. How about that literature, was the only time you distributed literature while you were at these shows?

A. No, all during the time that I worked there, we circularized the restaurant owners through the United States, of which there are about sixty thousand and also answered [20] inquiries that came in after the receipt of this descriptive literature we had sent out to them.

Q. Who did that circularizing?

A. I did that.

Q. How? A. That was my work.

Q. How?

A. By mailing and typing the addresses on the outside of the envelope and enclosing the folders, sending it to the restaurant people, answering their inquiries as they came in.

Q. Now, getting back to the year 1936, tell what you know of our association with Mr. Harry Holly at that time please?

A. Well, I remember very well in 1936 that that was the year that the patent application was filed on the first molding machine, and at that time, we began to be interested in it. And then in 1937, the patent was issued and at that time Mr. Holly had absolutely no money and the patent was secured on the promise that if it materialized then we would help him finance and get started in the business.

So we rented a very small place where he was able to put up the machine and work and make further developments on it and during all that time we

(Testimony of Elizabeth M. Fihe.)

paid Mr. Holly—he had no money, so he started out on a salary of \$35.00 per week and he [21] worked on the machine and as we needed more equipment, we continued to put the money into it because it looked good to us.

Q. How long did that go on, as far as our putting money into that partnership is concerned?

A. That went on through the years, well, up until about 1940, and we put in on an average of \$8,000.00 or \$9,000.00 a year, the majority of which was my money.

Q. Do you remember about how much you put in personally over the years?

A. Well, it would be around \$35,000.00, I would say, \$30,000.00 to \$35,000.00.

Mr. Fihe: May I have this document marked as Petitioner's Exhibit No. 1, please?

The Clerk: Petitioner's Exhibit No. 1 for identification.

(The document above-referred to was marked Petitioner's Exhibit No. 1 for identification.)

Mr. Fihe: If the Court please, I would like to have the—strike that.

Q. (By Mr. Fihe): I show you a document which has been marked Petitioner's Exhibit No. 1 for identification——

Mr. Fihe: How far were we with this question? Will you read it, please? [22]

The Reporter: Yes, sir.

(Question read.)

(Testimony of Elizabeth M. Fihe.)

Q. (By Mr. Fihe): And I will ask you to state what that is, please.

A. That is a report from Dun & Bradstreet of the date of June 7, 1949.

Mr. Fihe: Would your Honor like to see that?

Q. (By Mr. Fihe): You have read that?

A. Yes.

Q. Would you state that it is substantially correct?

A. Yes, I would say it was substantially correct.

Mr. Fihe: Now, will you refer to—pardon me, if the Court please—to the second paragraph under the heading marked “History” and if the Court please, I would like to have that read into the record.

Mr. Townsend: Respondent objects to the question on the ground that the witness is testifying from a document which has not yet been introduced in evidence.

Mr. Fihe: I shall now offer the document, Petitioner’s Exhibit No. 1 in evidence.

Mr. Townsend: The next objection to the document is your purpose of the offer to prove the facts stated in that document, Mr. Fihe?

Mr. Fihe: Exactly. [23]

Mr. Townsend: The Respondent objects on the grounds that it is hearsay.

The Court: Objection sustained.

Mr. Fihe: I would like to point out, if the Court please, that that is a Dun & Bradstreet report which reports are recognized by businesses through-

(Testimony of Elizabeth M. Fihe.)

out the country and indeed, throughout the world, and I do not believe there is any better proof of our records than just those Dun & Bradstreet reports, in addition to the testimony of course.

How else can we prove it. It is a Dun & Bradstreet report on the business. They know what they are talking about. They cannot afford to put out false or misleading or wrong reports.

The Court: Those reports are based on information that is furnished them by the corporation, the concern about which the report is being written.

Mr. Fihe: That is correct, and the people who are officers of the corporation certainly know the history of the corporation.

The Court: Well, you have no officer here on the stand. I think your evidence is better than Dun & Bradstreet.

Mr. Fihe: My wife has already testified, of course, that it is substantially correct.

The Court: Well, I would rather have her testify as to those reports. [24]

Mr. Fihe: As to those reports?

The Court: As to those accounts.

Mr. Fihe: She was the treasurer of the corporation, your Honor.

The Court: The objection is sustained. Now, if you want to question her and develop those facts from her so that she will be subject to cross examination, you may continue, Mr. Fihe.

Mr. Fihe: Thank you, sir.

Q. (By Mr. Fihe): Could you—in order to re-

(Testimony of Elizabeth M. Fihe.)

fresh your memory, will you please read the first two paragraphs of this report?

Mr. Townsend: I hate to delay the proceedings here but I do not think there has been any showing that she does not have any recollection.

Mr. Fihe: There are some dates there, your Honor, which would assist her.

The Court: She may look at it.

Q. (By Mr. Fihe): Now, will you please state of your own personal knowledge as to when the four party partnership known as Holly Molding Devices was organized?

A. Approximately in January, 1945.

Q. And who——

Mr. Townsend: The Respondent moves to strike that [25] answer on the ground that the question includes a conclusion there?

Mr. Fihe: She is stating of her own knowledge.

Mr. Townsend: But the very thing that it is an issue before this Court is whether there was a four party partnership.

The Court: I will sustain that request to have the answer stricken and I wish you would develop from this witness exactly what happened around that date and what the facts were but not what the ultimate conclusion was from these facts, Mr. Fihe.

Mr. Fihe: Thank you, your Honor.

Q. (By Mr. Fihe): You were telling the Court about the origination of the original partnership composed of Harry H. Holly and myself back in

(Testimony of Elizabeth M. Fihe.)

1936 and you also told the Court as to your various activities in connection with that partnership.

Now, will you please tell the Court just how long that two party partnership continued?

Mr. Townsend: Your Honor, that is just saying the same thing in a different way.

The Court: Well, if the only testimony is going to be conclusions, I will have to draw my own conclusion.

The Witness: The two party partnership continued on until about 1945. [26]

Q. (By Mr. Fihe): Then what happened?

A. Then in 1945 in as much as we had put considerable money into it and I had worked out there as much as I did, that it was decided that we should each have an equal interest in the business, and in order to do that we were given each a quarter interest in it.

Q. Who were those people that got a quarter interest in it?

A. Harry Holly, Agnes Holly, Albert J. Fihe and Elizabeth M. Fihe.

Q. And how long did that partnership continue in existence?

A. Until September, 1946.

Q. And then what happened?

A. Then the business was incorporated.

The Court: Mrs. Fihe, when you say "we were each given a quarter interest," well, what took place?

The Witness: We entered into an agreement, the

(Testimony of Elizabeth M. Fihe.)

four of us, Harry Holly, Agnes Holly, Albert J. Fihe and Elizabeth M. Fihe.

The Court: Was it a written agreement?

The Witness: I think it was a written agreement. We all sat down together and said, "We have worked and you have worked and we have put money in and you have developed the [27] machine, so that we all ought to have an equal interest in it."

The Court: Is there a copy of that agreement available?

The Witness: The copy of it should be available at the headquarters some place. It was executed, I am sure.

The Court: You may proceed.

Mr. Fihe: I shall ask the clerk to mark this document as Petitioner's Exhibit No. 2 for identification.

(The document above-referred to was marked Petitioner's Exhibit No. 2 for identification.)

Q. (By Mr. Fihe): I show you another document which has been marked for identification as Petitioner's Exhibit No. 2 for identification, and I will ask you to state if you recognize that.

A. Yes.

Q. What is it?

A. This is a subscription agreement.

Q. Are there any signatures on it?

A. There are no signatures on this as it is a copy.

Q. Do you remember ever signing that?

(Testimony of Elizabeth M. Fihe.)

A. Yes.

Q. The original? A. Yes, I signed it.

Mr. Fihe: I will now offer Petitioner's Exhibit No. 2 [28] in evidence.

Mr. Townsend: I have no objection, your Honor.

The Court: Admitted.

(The document heretofore marked Petitioner's Exhibit No. 2 was received in evidence.)

Mr. Fihe: If the Court please, I would like to keep all the exhibits marked by the numbers in which I designated them rather than the exhibits which are received. If that procedure isn't approved by the Court, I will be glad to change the numbers.

The Court: Do you have any objection to that, Mr. Townsend?

Mr. Townsend: No, I don't.

Mr. Fihe: Otherwise the record might be confusing later on.

The Clerk: This is Exhibit No. 2?

Mr. Fihe: Yes.

The Court: What has become of the original of those exhibits?

Mr. Fihe: I am just going to ask the witness that question but if the Court please, I would like to have you look at it.

The Court: All right.

Mr. Fihe: Does the Court keep custody of that, your Honor? [29]

The Court: Yes, when you are through with it, Mr. Fihe.

Mr. Fihe: Yes.

(Testimony of Elizabeth M. Fihe.)

Q. (By Mr. Fihe): Do you remember who signed the original of that document?

A. Harry Holly, Agnes Holly, Albert J. Fihe, and Elizabeth M. Fihe.

Q. And do you know where the original is?

A. In the offices of the Holly Molding Devices, as far as I know.

Q. In what city? A. Chicago, Illinois.

Mr. Fihe: With all due reference to the objections of counsel and the Court's ruling, I have, with all due respect may I say, rather than reference, I will ask the Clerk to mark this document for identification as Petitioner's Exhibit No. 9.

(The document above-referred to was marked for identification as Petitioner's Exhibit No. 9.)

Mr. Fihe: May I explain at this time that there were depositions taken in this case in Chicago and in those depositions there were some exhibits and they were just marked for identification.

Now, unless we adhere to the particular numerical [30] order here, there will be some more difficulty, so with the Court's permission, may I sort of jump around in some part of these exhibits, but it will eventually prove out more coherent than if we started out with one here and started to get into these depositions as exhibits.

The Court: I do not have any objection so long as the record is clear as to what we are talking about.

The Clerk: That has already been marked for identification as Petitioner's Exhibit No. 9.

(Testimony of Elizabeth M. Fihe.)

Q. (By Mr. Fihe): And now, in order to refresh your memory—oh, I will show you this Mr. Townsend—have you seen it?

Mr. Townsend: No, I did not see it.

Mr. Fihe: Oh, I am sorry.

Q. (By Mr. Fihe): I will ask you to kindly look at this document marked Petitioner's Exhibit No. 9 for identification and I will ask you to refer particularly to the last paragraph on the last page, and ask you if that amount stated as \$85,750.00 which we were supposed to obtain for our interest when we sold out, is substantially correct?

Mr. Townsend: Respondent objects to the question on the grounds that the witness is testifying from a document that has not been introduced in evidence.

The Court: Well, I am going to take her statement [31] as being based on her own knowledge, rather than on the document.

Mr. Fihe: I am now offering the document in evidence as Petitioner's Exhibit No. 9.

Mr. Townsend: Respondent objects to the document on the ground that it is hearsay.

The Court: Objection sustained.

Mr. Fihe: May I again point out for the record, if the Court please, that this is an authentic Dun & Bradstreet report, which reports are generally accepted, at least, commercially and I believe, by the Courts.

The Court: I think the basis is for extending credit but as to the absolute veracity of the figures

(Testimony of Elizabeth M. Fihe.)

included therein, I think they are subject to objection. The Court could be wrong.

Mr. Fihe: I will now ask the Clerk to mark this document as Petitioner's Exhibit No. 7 for identification.

(The document above-referred to was marked Petitioner's Exhibit No. 7 for identification.)

Q. (By Mr. Fihe): I show you now what appears to be an original document which has been marked for identification as Petitioner's Exhibit No. 7 and I will ask you to state if you recognize the signatures on that document?

A. I do recognize them. [32]

Q. Whose are they?

A. Albert J. Fihe, Elizabeth M. Fihe, Harry Holly and Agnes Holly.

Mr. Fihe: Would you like to look at that, your Honor?

The Court: All right.

Q. (By Mr. Fihe): What is that document?

A. This is a deed conveying a piece of property from the partnership to the new owner.

Mr. Fihe: I offer the same in evidence as Petitioner's Exhibit No. 7.

Mr. Townsend: Respondent objects to the document. It has not been notarized. It isn't under seal and respondent objects to it on the grounds of genuineness.

The Court: The objection is overruled and I will accept it for what it purports to be. It isn't

(Testimony of Elizabeth M. Fihe.)

under seal—I don't know what effect that would have.

(The document heretofore marked Petitioner's Exhibit No. 7 was received in evidence.)

The Court: Was that document delivered to any one, Mrs. Fihe?

The Witness: Yes, your Honor.

The Court: To whom was it delivered?

The Witness: To the owner at one time. [32-A]

The Court: Who do you mean by "the owner" now, Mrs. Fihe?

The Witness: To us.

Mr. Fihe: From us.

The Witness: From us to the new buyer.

The Court: To the corporation?

The Witness: To the man whose name is on there.

Mr. Fihe: Yes, to Edwin——

The Witness: Edwin F. Zukowski.

The Court: How does it happen you have the document rather than he?

The Witness: It was probably purchased back later.

Mr. Fihe: I have a little more knowledge of that, your Honor, and I intend to ask the Court to swear me as a witness later on. I want to do a little testifying myself and I could then bring out some more pertinent facts about that particular document.

My wife could possibly tell you if she could

(Testimony of Elizabeth M. Fihe.)

think back just a little bit as to what actually happened at that time.

Off the record.

The Court: Off the record.

(Discussion off the record.)

Mr. Fihe: May it then be stipulated that the [33] photostatic copies of the particular papers which I am about to offer, be received in evidence with the same force and effect as the originals?

Mr. Townsend: Absolutely, no objection, so stipulated.

Mr. Fihe: I will now hand the Clerk a series of documents which I will ask him to mark for identification as Petitioner's Exhibits.

The Court: Well, now, let us see if we can dispense with that. Is there going to be any objection to the introduction of these into evidence, Mr. Townsend?

Mr. Townsend: I would like to have them identified, your Honor.

The Court: All right.

The Clerk: Is that one exhibit, sir?

Mr. Fihe: No, if you please, this is Exhibit No. 3.

The Clerk: Exhibit No. 3.

Mr. Fihe: Yes and 4.

The Clerk: 4.

Mr. Fihe: The next one is 5; the next one is 6 and the next one is 10.

The Clerk: 10.

Mr. Fihe: Yes, 10, if you please. [34]

(Testimony of Elizabeth M. Fihe.)

(The documents above-referred to were marked Petitioner's Exhibits Nos. 3, 4, 5, 6 and 10, respectively, for identification.)

Q. (By Mr. Fihe): I will ask you to state if you recognize the signatures on those documents?

A. Yes, I recognize the signatures.

Q. Whose are they?

A. Albert J. Fihe and Harry H. Holly.

Q. Just for the record, will you identify the dates and the amounts of those documents which are signed by Mr. Holly and myself.

A. One is——

Q. Petitioner's Exhibit No.—— A. 3——

Q. That is right.

A. ——is a note dated July 1, 1940, in the amount of \$4,511.56 payable to the order of Albert J. Fihe.

Q. Signed on behalf of——

A. Signed on behalf of Holly Molding Devices.

Q. Then what was Holly Molding Devices at the date of that note?

A. It was a partnership.

Q. Composed of?

A. Composed of Albert J. Fihe and Harry Holly. [35]

Q. How about the next exhibit, please?

A. Exhibit No. 4 is dated July 1, 1940, in the amount of \$3,590.67 payable to the order of Albert J. Fihe.

Q. Signed by?

(Testimony of Elizabeth M. Fihe.)

A. Signed by Albert J. Fihe and Harry Holly on behalf of Holly Molding Devices.

Q. And the next one, please?

A. Exhibit No. 5 dated December 3, 1940, in the amount of \$600.00.

Q. Is it signed by the same parties?

A. By the same parties payable to Albert J. Fihe, Holly Molding Devices, signed by Albert J. Fihe and Harry Holly.

Q. No. 6?

A. Is a note dated February 13, 1942, in the amount of \$988.85, payable to the order of Albert J. Fihe, signed by Albert J. Fihe and Harry Holly for Holly Molding Devices.

Q. And Exhibit No. 10, if you please?

A. And Exhibit No. 10 is a note dated July 1, 1940, in the amount of \$3,033.28 payable to the order of Albert J. Fihe, signed by Albert J. Fihe and Harry Holly, Harry H. Holly, for Holly Molding Devices.

Q. Now, will you please refer to Petitioner's Exhibit No. 10 and tell the Court, if you can, as to just what payments, if any, were made on the notes? [36]

The Court: Well, now, that will speak for itself, will it not, Mr. Fihe?

Mr. Fihe: That is true, your Honor.

I offer the photostatic copies of these notes in evidence as Petitioner's Exhibits Nos. 3, 4, 5, 6 and 10, respectively.

Mr. Townsend: No objection.

(Testimony of Elizabeth M. Fihe.)

The Court: Admitted.

(The documents heretofore marked Petitioner's Exhibits Nos. 3, 4, 5, 6 and 10, respectively, were received in evidence.)

Q. (By Mr. Fihe): Tell the Court, if you know, whether I or you even got all the money represented by those notes? A. No, we did not.

Q. Tell the Court, if you know, whether those notes represent all the money we put into that business? A. It doesn't.

Mr. Fihe: I will now ask the Clerk to mark this document for identification as Petitioner's Exhibit No. 8.

The Clerk: No. 8.

(The document above-referred to was marked Petitioner's Exhibit No. 8 for identification.)

Q. (By Mr. Fihe): I now show you a document which has been marked for [37] identification as Petitioner's Exhibit No. 8—do you think we could have a recess now, your Honor?

The Court: We will take a ten minute recess.

Mr. Fihe: Thank you, your Honor.

(Short recess taken.)

The Clerk: The Court is in session.

Mr. Fihe: Mr. Townsend, did you give me a copy of your amended——

Mr. Townsend: It is over on your desk.

Mr. Fihe: Oh, yes, thank you.

Will you read the last question which I started to ask—I think it was with reference to Exhibit No. 8?

(Testimony of Elizabeth M. Fihe.)

The Reporter: Yes, sir.

(Question read.)

Q. (By Mr. Fihe): I will ask you to state what that is, please?

A. This is a copy of the minutes of the first meeting of the Holly Molding Devices, Inc.

Q. And when was that, please?

A. That was in September, 1946.

Q. Where is the original of that document, if you know?

A. It was in the offices of the Holly Molding Devices in Chicago.

Q. Will you tell the Court whether you remember signing [38] the original of that document?

A. I do.

Q. Who else signed it?

A. Albert J. Fihe, Harry H. Holly and Agnes Holly.

Q. Will you tell the Court whether you actually received shares of stock in Holly Molding Devices, Inc., a corporation? A. Yes, I——

Q. Pursuant to the plan set forth in this document, Petitioner's Exhibit No. 8?

A. Yes, I did.

Mr. Fihe: I offer the document in evidence as Petitioner's Exhibit No. 8.

Mr. Townsend: May I ask a question on it, your Honor?

The Court: Yes.

Mr. Townsend: How did you secure that copy, Mrs. Fihe, or when did you secure that copy?

(Testimony of Elizabeth M. Fihe.)

The Witness: My husband is the one who could tell you that.

Mr. Townsend: How do you know that that is an accurate copy of the minutes?

The Witness: Because I saw the original.

Mr. Townsend: That is what I mean.

The Witness: I saw the original at the time it was signed. [39]

Mr. Townsend: And you received this copy at that time?

The Witness: I don't know.

The Court: Well, there is no evidence that she received it but she identified it as being a copy.

Mr. Townsend: I have no objection.

The Court: It is received, as Petitioner's Exhibit No. 8.

(The document heretofore marked Petitioner's Exhibit No. 8 was received in evidence.)

Q. (By Mr. Fihe): What did you finally do with the stock of that corporation that you received at that time, in September of 1946?

A. I sold the stock.

Q. And I believe you have already testified, refreshing your memory from one of these Dun & Bradstreet reports, that we, you and I, have received, for our stock, \$85,750.00 and that you remember that; is that correct? A. Yes.

Q. How was that paid to us?

A. Well, originally we received a payment of \$25,000.00. Then——

The Court: Cash, you mean?

(Testimony of Elizabeth M. Fihe.)

The Witness: Yes, your Honor. Then I received [40] \$970.00 a month plus interest and you received \$780.00 a month plus interest for the balance of \$85,000.00.

Q. (By Mr. Fihe): Could you tell why you got a little more than I did?

A. Because I put more money into the business originally.

Mr. Fihe: You may cross examine.

Cross Examination

Q. (By Mr. Townsend): Mrs. Fihe, would you tell me where you lived prior to moving to Chicago? A. In Chicago, Illinois.

Q. Prior to moving to Chicago?

A. Oh, my, that was so long ago. It was Preston, Minnesota.

Q. Preston, Minnesota? A. Yes.

Q. Did you ever live in Indiana during part—

A. Yes, during part of the year.

Q. Where was that located in Indiana?

A. It was Dune Acres, two words, D-u-n-e A-c-r-e-s. However, our voting address was Chicago, Illinois.

Q. Was that in Chesterton?

A. That was the post office, we received our mail there. [41]

Q. Where did you live exactly in Chicago, do you recall that? A. During what time?

Q. Oh, during the period 1947 to 1948.

(Testimony of Elizabeth M. Fihe.)

A. 1947 to 1948, we lived at 179 Lakeshore Drive.

Q. Was that a cooperative apartment?

A. Yes.

Q. Do you recall when you sold that apartment?

A. Well, it was prior to our coming out here. I would say it was probably July of 1948.

Q. And your home at Chesterton, Indiana, do you recall when you sold that; was that at about the same time?

A. That was subsequent thereto.

Q. Was it in the same year, Mrs. Fihe?

A. Yes. Well, I am not sure about that. It may have been January of the next year. It was either late one year or early the next year.

Q. When you sold your apartment at 179 Lakeshore Drive, did you also sell your furniture or some of your furniture at that time?

A. Well, maybe part of it—some of it, yes.

Q. Now, when you spoke about selling your shares of stock in the corporation, when did you sell those shares?

A. Approximately the spring of 1948.

Q. And who did you sell them to? [42]

A. To the corporation, Holly Molding Devices, Inc.

Q. Are you familiar with the records that your husband has kept and which he has brought into Court today, the check book stubs?

A. No, I am not.

Q. You are not at all familiar with those?

(Testimony of Elizabeth M. Fihe.)

A. No.

Mr. Townsend: Could I use them, please?

Mr. Fihe: Yes.

Q. (By Mr. Townsend): Are you familiar at all with this book that I am showing you now, Mrs. Fihe? A. Yes, sure, I have seen it.

Q. Will you tell me what it is, please?

A. You mean what I think it is?

Q. Yes.

A. Well, I think it is the stubs from my husband's check book.

Q. Now, I turn to an entry therein which is dated May 29, 1947, and ask you to read that, if you would please, Mrs. Fihe?

The Court: You mean aloud?

Mr. Townsend: Yes, aloud.

The Witness: 49 shares of Holly stock \$4,900.00.

Q. (By Mr. Townsend): Now, you note the date on that, Mrs. Fihe, is in May, 1947?

A. Where is the date again?

Q. Here is the month, the day and the year.

A. Yes, I see that. What is it you want to know?

Q. Well, that would indicate——

A. I am not qualified to make any comment on that.

Q. You don't recall anything about selling any shares in 1947?

A. I don't know anything about that.

Q. But you did not sell any shares in 1947?

(Testimony of Elizabeth M. Fihe.)

A. Well, not to my recollection. I may be wrong on the date.

Q. Now, when you advanced money to the partnership and to the corporation, did you receive notes for your advances, Mrs. Fihe?

A. In the beginning we received nothing for the reason that it started out very simply like so many things do and it kept accumulating and it kept accumulating until it got to be too much that we did not get any notes until roundabout in 1940.

In these early years, we had no notes. But the demands continued to get larger and larger and in 1940, we asked for notes. I did, because I felt I could not put more into it [44] without having something definite to show for it, although we trusted Mr. Holly.

Q. Sure. Now, you ascertained a figure that you put into the partnership; what is your basis for that estimate, Mrs. Fihe?

A. Well, from what amounts I had available to do something with in those years.

Q. Before coming to California, did you check something to find out what you had available in those years?

A. Oh, not now. I knew about that some time back. It made a great impression on me because I was going into something I had never gone into before.

Q. From where did you receive your money?

Mr. Fihe: Objection, your Honor. That is absolutely immaterial.

(Testimony of Elizabeth M. Fihe.)

The Court: Objection overruled.

The Witness: Shall I answer, your Honor?

The Court: Yes.

The Witness: I had worked previously and made a very good salary and kept my money because my husband supported the family and made the agreement with me that I could keep my money or do anything with it I wanted to. I was earning a very much larger salary than most women received in those days. [45]

Q. (By Mr. Townsend): How long did you work in that business?

A. How long did I work there?

Q. Yes, the years.

A. Well, it began around about 1926 and went on intermittently up to 1927, 1928, 1929 and on at various times although there were times intervening when I wasn't earning, but on and off, beginning in 1926.

Q. And ending roughly when, Mrs. Fihe?

A. Well, let me see, probably around 1942 or 1943 or something like that.

Q. 1942 or 1943? A. Yes.

Q. So that you did have outside employment at the time that you were—at the time the partnership was in operation? A. Yes, off and on.

Q. Could you tell me roughly what your salary would average in this outside work?

A. Well, \$5,000.00 to \$6,000.00 a year probably.

Q. And what type of work did you do, Mrs. Fihe?

(Testimony of Elizabeth M. Fihe.)

A. Well, I did social service work connected with the Courts, head of various social service departments.

Q. Now, do you recall how many days you worked say in 1946, for the partnership, Holly Molding Devices?

A. Oh, it would be very difficult to tell you exactly. [46]

Q. I mean before the partnership; did you go down there every day? A. Oh, yes.

Q. Did you have your own office down there?

A. Yes, there were offices set out that we occupied.

Q. And did you go down there every day?

A. Yes.

Q. During 1946? A. Yes, I did.

Q. How about Agnes Holly, was she also down there every day?

A. Well, I saw her on and off at various times. I was there a lot of times in the evenings too. I went there nights as well as days.

Mr. Townsend: I believe that is all, your Honor.

Mr. Fihe: If the Court please, I have made a resume——

The Court: Are you finished with Mrs. Fihe?

Mr. Fihe: Yes, I think so.

The Court: You are excused. Thank you.

(Witness excused.)

Mr. Fihe: I have made a resume of the amounts of money shown on our books which we received from Holly Molding Devices, either the partner-

ship or the corporation in 1946, 1947, 1948 and 1949. [47]

The Court: When you say "we", do you mean your wife and you?

Mr. Fihe: That is correct, your Honor. And I would like to offer that resume as one exhibit, Petitioner's Exhibit No. 11—is it, Mr. Clerk?

The Clerk: That is correct.

(The document above-referred to was marked Petitioner's Exhibit No. 11 for identification.)

Mr. Fihe: I might explain that in this resume, I have indicated money received by me as of the dates shown and my initials, and money received by Mrs. Fihe, as of the date shown and her initials and when it was definitely salary I have so marked it.

On occasions we would get some money back on our loan account as evidenced by the notes which are here in evidence and that is also marked.

I think offering this as an exhibit, as one exhibit, will suffice if the Clerk will so mark it, please.

The Clerk: It has been marked for identification as Petitioner's Exhibit No. 11.

Mr. Townsend: Are you offering it?

Mr. Fihe: Yes.

Mr. Townsend: Your Honor, in the first place, I would have to check this exhibit against the records of Mr. Fihe which consist of the check book stubs here in the room. [48] I have done so and this record does contain a good many of the items as shown in his check book records as cash received. However, there are also a number of items

that have been omitted from that exhibit, and I would also like to point out that the figures on there are misleading to some extent, in that they are net figures, which actually if that was solely a cash receipt schedule, it would be correct.

The payments are net after tax has been taken out. But when he gets into the latter part of it here, when he has omitted some cash received on the grounds that it isn't income in his opinion, therefore, I do object to the exhibit for that reason that it isn't truly a cash received schedule and even his own records show additional cash received from that.

Possibly we can do that by reading into the record the items which are not included in this list and take it in the form of a stipulation, rather than an exhibit.

Mr. Fihe: I had planned to ask the Court to swear me and I will clearly testify about those points which I believe would probably bear it out better than in any other way.

Mr. Townsend: At this time I would have to object to the exhibit on the grounds that I do not think Mr. Fihe is qualified to prepare this exhibit.

I would be happy to stipulate to that exhibit if the omissions were mentioned.

The Court: How do you intend to do that? [49]

Mr. Townsend: I would read the omissions into the record and perhaps Mr. Fihe will stipulate to that.

The Court: Can counsel get together and see if you agree on that?

Mr. Fihe: We can stipulate after we get together on them. I am sure we can do that.

The Court: How long would it take? Supposing I gave you a short recess and see if you can get together on it?

Mr. Fihe: I think we could do it in fifteen to twenty minutes.

Mr. Townsend: Possibly less than that, your Honor.

The Court: All right, we will recess and you can get together on it.

Mr. Fihe: Thank you, your Honor.

(Short recess taken.)

The Clerk: The Court is in session.

Mr. Townsend: Your Honor, I think the parties can stipulate to Petitioner's Exhibit No. 11, to the effect that it represents the amounts received in cash by Mr. and Mrs. Fihe per their check book records here as indicated thereon with the exception that the following amounts have not been included on this list.

Mr. Fihe: May I interrupt at this moment, please, your Honor? As part of the stipulation, may it also be [50] stipulated that this check stub book represents a joint account of Mrs. Fihe and myself?

The Court: Is that agreeable, Mr. Townsend?

Mr. Townsend: It apparently is, your Honor. It looks that way. Deposits for both are received thereon.

The Court: All right, proceed.

Mr. Townsend: The first item is February 13, 1946, there is an entry in the record of tax \$601.75

interest and penalty of \$169.68, representing tax for 1941, which is paid by a check by the Holly Molding Device——

Mr. Fihe: On behalf of Albert J. Fihe.

Mr. Townsend: Right.

Mr. Fihe: And that is so stipulated, your Honor.

Mr. Townsend: The next entry is on March 14, 1946. There is the receipt of \$300.00 for the sale of an automobile from Mr. Fihe to the partnership.

Mr. Fihe: That is also so stipulated, but I would like to reserve an opportunity to show that there was a loss on that sale. I do not believe I claimed any loss at the time I turned in my return at that time.

Mr. Townsend: And on August 21, 1947, there is a receipt of \$150.00 from Holly Molding Devices as a refund on motors.

Mr. Fihe: May we stipulate there that out of our joint account, Mrs. Fihe and mine, paid for those motors in [51] the amount of \$150.50 and then when the company got some money, they gave me \$150.00.

Mr. Townsend: The records indicate that you paid \$150.50.

Mr. Fihe: Yes.

Mr. Townsend: That is correct. And they indicate that you were reimbursed that amount.

Mr. Fihe: Yes, with the exception that I was fifty cents out on the deal. Will it be so stipulated?

Mr. Townsend: I will stipulate the record so indicates.

There is an entry, September 12, 1947, which is

included on page 3 of Petitioner's Exhibit No. 11 and is listed on the exhibit as sale of furniture, \$5,890.00. The records indicate that that sum was received from the sale of furniture and patent work by Mr. Fihe. It doesn't make any allocation.

Mr. Fihe: May it also be stipulated—just hold it a minute—maybe I had better testify to this, your Honor.

Mr. Townsend: All we are showing is what your records show.

Mr. Fihe: All right, that is so stipulated. Let me make a note of it.

Mr. Townsend: There is an entry of September 30, 1947, showing a \$2,000.00 receipt plus a \$96.40 receipt, which [52] on the books is a deposit. And it is marked Elizabeth M. Fihe account Elizabeth M. Fihe loan. And you are going to testify in respect to that, Mr. Fihe?

Mr. Fihe: Yes.

Mr. Townsend: Again on page 3 of Petitioner's Exhibit No. 11, the three figures at the bottom of that page, specifically \$5,890.00, \$1,000.00 and \$2,600.00 are not included in the total figure shown above, \$24,780.15 as cash receipts.

Mr. Fihe: That is so stipulated.

Mr. Townsend: The books indicate that \$5,890.00 was received, that \$1,000.00 was received, and they do not indicate that \$2,600.00 was paid out by Mr. Fihe, and you were going to testify with respect to that item?

Mr. Fihe: That is correct.

Mr. Townsend: With that, your Honor, the Re-

spondent will stipulate that the records of Mr. Fihe are as indicated on Petitioner's Exhibit No. 11.

The Court: All right, Petitioner's Exhibit No. 11 will be admitted.

(The document heretofore marked Petitioner's Exhibit No. 11 was received in evidence.)

Mr. Fihe: Thank you.

Now, of course, your Honor, it is rather out of order for me to—— [53]

The Court: As long as you are appearing pro se, I don't know how else you can do it. The Clerk will swear you, Mr. Fihe, and you will take the stand.

Mr. Fihe: All right, your Honor.

The Clerk: Will you state your name for the record?

Mr. Fihe: Albert J. Fihe.

Whereupon,

ALBERT J. FIHE

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Court: Now, I don't know if you can do it but make your testimony as factual as possible, so that counsel can cross examine you on it.

The Witness: That I shall attempt to do, your Honor.

If the Court please, I will stand here as I feel more comfortable right here, if that is all right with you.

(Testimony of Albert J. Fihe.)

The Court: It is agreeable to me.

The Witness: First, with regard to the amount of \$5,890.00 which is listed in my Petitioner's Exhibit No. 11 as received by me for the sale of furniture and for patent work, may I ask the Clerk to mark this document which I have for identification as Petitioner's Exhibit No. 12. [54]

(The document above-referred to was marked Petitioner's Exhibit No. 12 for identification.)

Mr. Townsend: I have already seen that.

The Witness: Yes, you have already seen that, Mr. Townsend.

That, your Honor, is a bill of sale for the furniture which I owned at the time and which I had used in connection with my law practice in Chicago and which I had moved to the offices of the partnership, and later the corporation, in order to consolidate my offices.

And when we sold out, I presumably sold that furniture for the sum of \$5,890.00. I got a check for it.

The Court: From whom?

The Witness: From the corporation. Later, there was quite an argument about that and in order to settle the argument and not have any more trouble, I agreed to execute this bill of sale which is here for the furniture and receive only \$8,090.67. That is my signature on the bill of sale. It is dated January 19, 1948.

It is notarized and I hereby offer it in evidence as Petitioner's Exhibit No. 12.

(Testimony of Albert J. Fihe.)

Mr. Townsend: Why is the date changed in there, Mr. Fihe?

Mr. Witness: We had, I guess your Honor doesn't mind if we sort of work this back and forth? [55]

The Court: No.

The Witness: I think it is better if we work this back and forth, rather than definite cross examination. It will be better I am sure.

We had originally agreed to sell our stock in the corporation in the middle of December, 1947, and we had accepted an escrow for it in the amount of \$1,000.00 to bind the agreement, but it appeared, your Honor, that they could not get the remaining \$24,000.00 together within the thirty days agreed upon in the escrow, and therefore, these documents which were prepared about the middle of December, were not executed by me or by Mrs. Fihe.

Later, Mrs. Fihe and I both happened to be in California at that time and they asked if we would give them an extension in order to allow them possibly to get the \$24,000.00 together. We agreed to that and then when they did get the money together, then I executed the bill of sale for the furniture which was in Chicago, and while it was worth a great deal more than that, I agreed to it rather than have any further argument. At the same time, my account was charged with the \$5,000.00 differential.

Mr. Townsend: There is no objection to the document.

(Testimony of Albert J. Fihe.)

The Court: It will be admitted as Petitioner's Exhibit No. 12. [56]

(The document heretofore marked Petitioner's Exhibit No. 12 was received in evidence.)

The Witness: Now, referring to the notes in our joint check stub book dated—the one dated September 30, 1947, and which counsel has asked Mrs. Fihe to read into the record, apparently, if the Court please, that was an inter-family transaction where Mrs. Fihe gave me \$2,000.00 because on that same date I note that I had paid a real estate company in Chicago the sum of \$2,500.00 as a down payment on the cooperative apartment, which we bought at that time and actually to which Mrs. Fihe has testified on cross examination.

And our check book shows that I did not have enough money to cover that check, so apparently she gave me \$2,000.00 for that account to cover the check.

There is another item which Mr. Townsend did not mention, which I think I had better bring out. It is dated May 29, 1947, and it is in my own handwriting in this check stub book, reading as follows: "Elizabeth M. Fihe, 49 shares of Holly Molding Devices, \$4,900.00". Now, I apparently got \$4,900.00 from Mrs. Fihe for 49 shares of Holly Molding Devices stock, which I apparently sold her at that time.

I must have bought it back later because when we turned in our stock, I got paid for it by the corporation and [57] apparently from looking a couple

(Testimony of Albert J. Fihe.)

of pages further on in the book, I find that once again I was quite short of money and had only a couple of hundred dollars in the bank and there was a charge account, my account of \$2,600.00 which I had agreed to give Mr. Harry Holly for legal fees.

In that connection, Mr. Holly was indicted by the Grand Jury in Chicago for attempting bribery of an income tax agent. This happened while I was out here in the west coast and it was while I was working in connection with the corporation. I was out here for six or eight weeks.

When I returned, Mr. Holly told me that our auditor, a man by the name of Bornstein, had arranged with an agent, an internal revenue agent who was at that time going over the books of the corporation, to save us about \$3,000.00 in taxes if Mr. Holly and I would give Mr. Bornstein and the agent \$1,500.00, \$500.00 to be contributed by Mr. Holly and \$1,000.00 to be contributed by me.

Mr. Townsend: Your Honor, I wish to interpose an objection here because I am not familiar with the facts of this case as Mr. Fihe is discussing it. I think it is hearsay as to the actual background of this case and I am not sure of the materiality of it to this case.

The Witness: I am testifying under oath, your Honor, and I am trying to bring out all of the facts so that they will be before the Court. [58]

The Court: Now this \$1,000.00; is that one of the items in controversy here?

The Witness: No, but the \$2,600.00 is.

(Testimony of Albert J. Fihe.)

Mr. Townsend: The \$2,600.00 is.

The Court: The objection is overruled.

The Witness: Thank you, your Honor. And I will now continue. When I returned from the trip, Mr. Holly told me that he had made arrangements with the agent and with our auditor to make the books in such a manner that we would save \$3,000.00 in taxes.

I told Mr. Holly that would not do and I would have no part of it. He said, "I have already made a down payment of some \$200.00 to the agent and you are supposed to give him \$800.00 more, and I am supposed to give the auditor \$500.00".

I told him that that was just out of the question, that I was a reputable attorney at law and I wished no such part of any doings, but he said, "Well, I made the deal and we will go through with it". Now, this is of my own knowledge; I was there. That happened and after considering it overnight, I went to the chief agent in charge in Chicago and reported the whole proceeding and I told him that I felt, rather than just not agree to this thing, I had better report it in the interests of the Government.

Thereupon, the Federal Bureau of Investigation came into the case and they asked me to give the agent some [59] marked money. I objected to that. I said, "I do not want to crucify anybody. The fellow is undoubtedly crooked and I do not want any part of the crookedness, but I don't want to crucify anybody".

(Testimony of Albert J. Fihe.)

The F.B.I. agent insisted that I go along with it because there was a lot of this going on, they said, and that it was never discovered and, "You are only—you will only be doing your duty as a citizen. You have already done your duty in reporting it and now you must help apprehend the culprits", so very reluctantly I went along and I gave the agents marked bills.

And the F.B.I. were outside the building and as soon as he left, I was to pull up a shade, signalling that he had left and of course, they picked him up.

At the trial, it was of course determined that Harry Holly was a partner to it and the auditor and the agent and they got varying terms. Harry got six months and the auditor and the agent got more. That is how this \$2,600.00 comes in, because Harry had a family, a wife and two or three children at that time, and I really hated to see my partner go to the penitentiary, so I offered to pay his legal fee which amounted to \$2,600.00 and that explains that item, your Honor.

The Court: Did you claim that as a business deduction? [60]

The Witness: I never issued a check for it, your Honor, it was merely charged to my account, and of course, I never got the money. It was a company check that was issued, but it was charged to my account and I am filing it as a business deduction, yes.

Now, rather than try to argue the case at this

(Testimony of Albert J. Fihe.)

time, I think I had better do a little bit more testifying.

The Court: That is right.

The Witness: Getting back to 1946, I wish to point out to the Court that it was a true partnership beginning in January of 1945. I personally, as a practising lawyer in Chicago, admitted to the Illinois State Bar, organized that partnership. I am quite sure that I prepared the actual papers and that they were signed by the four of us just as Mrs. Fihe testified.

Regarding the whereabouts of these papers, I have no idea because after Mr. Holly went to the penitentiary, as you can imagine, your Honor, it was—well, there was a terrific amount of ill feeling around the place. I was there. I was the cause of his having been indicted and sentenced and frankly, I wasn't in very good repute.

But I stayed there and continued to run the business. It was, at that time, a corporation. I organized the corporation. The actual date of organization was September 25, 1946, and these documents, some of which are [61] here in evidence, indicate that the original four partners, when the corporation was organized, turned in all their interest in the partnership which was equal four shares for stock in the corporation.

I, as a practising lawyer in Chicago, admitted to the Bar of the State of Illinois, organized that corporation and I am sure it was properly organized. The Certificate of Incorporation was granted

(Testimony of Albert J. Fihe.)

by the Secretary of State and in the Certificate we stated that we were receiving shares in the corporation for our shares in the original previous partnership.

There are some penalties assessed against both Mrs. Fihe and me for negligence in keeping our books. In our protest, we naturally disagree with those penalties. We believe that we kept our books in good shape. In fact, I have here a record of all of our transactions during those years and I believe that Mr. Propeck, the agent here, has gone through that book very carefully.

Well, somebody from this office has indicated negligence but I know that somebody from the Commissioner's office has been through that book. I am positive of that because he came out to my office at Burbank and stayed there for two days. I don't remember whether it was this gentleman or not.

Now, referring to my petition for the year of 1946, [62] there were some deductions which I took and which I am sure were quite correct. And in Chicago, working with the agent's office there, and as I stated at the beginning, I spent one solid week and I was every day in the agent's office and we went through the books, very, very carefully. He checked item by item and he did not miss anything and we agreed that some of my deductions were possibly a little big.

It was also agreed, your Honor, that I forgot to take deductions sometimes to which I was entitled

(Testimony of Albert J. Fihe.)

and we had worked out what I thought was a rather reasonable adjustment of the whole thing.

Then, when the report came in, the agent there with whom I had worked, and who seemed to be quite a nice chap, just backed out on practically all of the things, and of course, he disagreed with our claim that it was a partnership and taxed me for the partnership income, which amounted to a great increase in the taxes. And——

The Court: Well, he just taxed you with the portion that had been paid over to your wife.

The Witness: That is right.

The Court: He did not tax you with the Hollys' part?

The Witness: No, he taxed me with half of the partnership interest instead of a quarter of it. There were other things and I see no point in taking up the Court's time [63] on the little items. For example, in one of these reports, the agent objected to my deduction of \$19.00 for medical expenses. Well, that was the total medical expenses deduction for a whole year and he decided that, no, that was not, and that is just typical of the reaction of this agent to our returns in there.

The same with contributions and interest. I will agree with Mr. Townsend that I accidentally put down interest twice in one of my returns, because there are two places on it and I was working on that return about two hours before midnight on the last night for mailing it, and it was just an

(Testimony of Albert J. Fihe.)

honest mistake. I will agree that there was a mistake.

Now, I believe I did inadvertently deduct some taxes that were not deductible, such as some income tax, but there are a lot of other taxes, such as rent, estate tax and sales tax and so on, which were practically disallowed completely and I know some of these items were properly deductible.

Now, in the year 1947, your Honor, I put down contributions in the amount of \$92.00. Now, I think it is quite reasonable that anybody will make \$92.00 in contributions in a year to churches and other charitable institutions. That was disallowed, the whole in total.

There is another item in 1947 which was charged to me in the way of royalties from Holly Molding Devices in the [64] way—strike that last word—in the amount of \$1,166.57. We never got any royalties from that company. I did get some royalties, but not from Holly. The Holly people reported that in 1947 they had paid Mrs. Fihe and me dividends in the amount of \$8,800.90. Neither one of us ever received any dividends. We did not get money back on loans as evidenced by the notes.

We did draw salary from time to time. In fact, the last year I received a salary of \$400.00 a week regularly and that is shown on Petitioner's Exhibit No. 12. In that exhibit, I stated the net rather than the gross of \$400.00 per week because there was an amount of \$60.00 and some odds taken off for withholding taxes and what not, so I represented the

(Testimony of Albert J. Fihe.)

net amount that I got, but it is obvious in a salary of \$400.00 a week, there is some deduction. That is perfectly understandable.

A great deal of this material from which apparently the agents in Chicago and possibly the agents here have charged to my account and Mrs. Fihe's, was garnered from the records of Holly Molding Devices in Chicago, and by the way, that corporation has changed its name to Hollymatic. H-o-l-l-y-m-a-t-i-c, after we sold out.

They employed some auditors to go through their books and they went back, I think over—well, all the way back to some time in 1945, and they concocted—and I use that term advisedly—some rather peculiar reports and results, [65] showing quite a bit of money either charged to our account or showing money that we were supposed to have received and which we did not get, and which, I am sure, your Honor, is over and above those amounts which we have listed in Petitioner's Exhibit No. 12 and which represents all the money that we ever got out of the partnership or the corporation in those years.

That I am certain of. And they have shown that we got a lot more and I might say, there is some pretty fancy bookkeeping in there. There is a mathematical error of \$64.90, which is minor, of course.

Mrs. Fihe and I invested in some copper company back in 1947 which went broke and we forgot to take off the loss. That should have been deducted and claimed. We accidentally credited ourselves for

(Testimony of Albert J. Fihe.)

only two dependents, when actually we had three. I would have known that we had three children but we only took credit for two, but those are more or less minor items, your Honor, which did not amount to very much at all in the end, it seems to me.

There is an item claimed here of casualty loss of \$2,300.04. In that connection, when we moved our furniture out here, it was certainly in a wreck somewhere, because when we got it, most of it was almost irreparably damaged—a beautiful marble top table that we had was just broken into smithereens—some of the fine furniture looked as if it had been dragged through the mud. The upholstery was torn and [66] almost beyond repair. Some valuable lamps were gone completely. My wife had a very valuable ring somewhere in that furniture and it never did get here. May I say that at one time I saw my wife weeping very bitterly when she saw that furniture.

Again in the 1948 year, contributions—we made contributions, everybody does, but they just disallowed them. Also medical expenses, they were disallowed completely and we are charged with a negligence penalty. I do not understand that at all.

The same in the year 1949, your Honor, we kept books, we kept good records, we turned in our reports as we should and we stated that we had made contributions in the amount of \$238.00—all of it was disallowed.

There was a charge, a deduction of \$10,000.00

(Testimony of Albert J. Fihe.)

some odd dollars, in our return under the heading of "Repairs, advertising, legal expenses, traveling expenses, interest, postage" and some other items—it was just arbitrarily disallowed.

Now, if the Court please, it happened that when we got here in 1948, I practiced patent law and started a little factory in Burbank, trying to do substantially what we had done in Chicago, manufacturing a few little patented items. Well, unfortunately, I picked something which did not sell. It was a fishing reel. And I spent a great deal of money trying to promote the sale of that fishing reel and I spent a [67] great deal of money manufacturing reels, buying dies and tools and parts and so on, all of which was practically a complete loss, but apparently I cannot convince the agents that I managed to lose that much money. I am sorry to say that I did.

Then, so far as the year 1949 is concerned, I was getting money on those notes from the sale of our stock and unfortunately that money was spent also—it also went down the drain in trying to get this factory going in manufacturing and selling these fishing reels.

We just lost money in 1949 and 1950 which, by the way, isn't here before the Court as yet.

The agent reported that my business income was \$10,000.00 some odd dollars in my return which just cannot be. That is in 1949. He disallowed quite a number of charges for repair. When one buys machinery—and I bought second-hand machinery

(Testimony of Albert J. Fihe.)

to start the factory out there—it needs quite a bit of repair. He disallowed \$2,000.00. I spent a terrific amount on advertising in the year 1949, trying to promote the sale of that fishing reel. The agent disallowed \$2,600.00 of it.

I did a lot of traveling; the agent disallowed \$1,900.00 of traveling expenses. He disallowed interest which I had paid on loans in the amount of \$600.00. The agent disallowed postage in the amount of \$249.00. How can a business [68] operate without spending money for postage and that is only \$20.00 a month, which I think is very reasonable.

There is an item here of telecast expenses which he disallowed. It is marked “duplication”. I will have to check that. “Telecast” was the trade name of that fishing reel. Then we were making another called the “Bandmaster” which was also a loss. Although we lost the money, it was disallowed as a duplication.

The item of depreciation was reviewed and some odd \$700.00 was disallowed—depreciation both on real estate and machinery.

Frankly, in summing up, your Honor, I am convinced in my own mind that we paid our taxes. I try to do my duty as an honest citizen. I think the record will show that I have done so, and frankly I have gone about my duty in reporting what happened.

I believe our petition should be allowed practically entirely with the exception of possibly some adjustments relating to mistakes which I admit

(Testimony of Albert J. Fihe.)

were made and which I conclude were made honestly.

Do you wish to ask me some questions now, Mr. Townsend?

Mr. Townsend: Yes, please, Mr. Fihe.

The Witness: I will keep my records and sit up here, if you don't mind. [69]

Cross Examination

Q. (By Mr. Townsend): Mr. Fihe, in 1948, when you sold your stock and your buildings, and your patent rights to the corporation and your residences, did you or do you recall that you made up a schedule D which you did not include in your return?

A. Schedule deed.

Q. D. A. Oh, D.

Q. Yes. A. What is that?

Q. That is a breakdown of the items that you are showing as to capital gain and capital loss. Let me show you your return for that year, Mr. Fihe.

A. Yes, this is our joint return for 1948.

Q. Now, Mr. Fihe, you did not attach a schedule D which is the form which breaks down this item of capital gain. However, you did prepare one and you showed the copy of the one you prepared to the agent in Chicago. Do you recall that, Mr. Fihe?

A. No.

Q. You don't recall showing it to him?

A. No.

Q. That agent purportedly made a copy of that schedule D which you had in your work papers

(Testimony of Albert J. Fihe.)

but did not file. [70] I show you a copy which he purportedly prepared, which is an exact copy of what you showed to him and I ask you if you are familiar with that?

A. I certainly have no recollection of this. It is possible that I made it up in conjunction with the agent.

Q. And all this was prepared at the time of the return you say?

A. But it wasn't attached to the return?

Q. That is correct.

A. I will agree that this photostatic copy that you have here is a photostatic copy of our joint return but I certainly will not admit that I made this schedule up. I do not remember anything about that, but it is possible that the agent may have made it up when he was going over the return at the time.

Q. Do you have your retaining copy of your 1947 return, Mr. Fihe? A. Yes, I may have.

Q. Do you have it here in Court with you?

A. Possibly.

Q. Will you get it for me, please?

A. I will see. That is 1948?

Q. 1948, yes.

A. If the reporter please, that is 1948 to which we are referring. Yes, I have here apparently my work sheet for [71] our joint return of 1948 and also a carbon copy of the typewritten return and if you will bear with me a moment, I will check

(Testimony of Albert J. Fihe.)

it with your photostatic copy and see whether they are in agreement or not.

Yes, I have here in my own handwriting a preliminary draft of schedule D for my return—our return, for 1948, and it checks precisely with the typewritten sheet which you have just handed to me, and——

Q. And that is the sheet that you used to reach your figures for the schedule D page 2 of the return which you filed? A. That is correct.

Mr. Townsend: It is offered in evidence. It is Exhibit A, a copy of the schedule D which was used by Mr. Fihe in preparing his 1948 return.

The Witness: I don't know if I can say that but I have no objection anyhow.

The Court: Admitted.

(The document above referred to was marked Respondent's Exhibit A for identification and was received in evidence.)

Q. (By Mr. Townsend): Now, Mr. Fihe, referring to that same document, Exhibit A, would you please tell the court the various items [72] on the return?

To save time, you reported on there, "Home at Chesterton, Indiana"—is that correct?

A. Right.

Q. And you show a loss on sale in 1948 of \$18,550.60? A. That is correct.

Q. That was your personal residence in Chesterton, Indiana?

A. Our summer home, yes.

(Testimony of Albert J. Fihe.)

Q. I show you up above there, apartment at 179 East Lakeshore Drive, Chicago, in which you apparently sold for the same price that it cost you?

A. We sold it for less than what it cost us but it wasn't worth bothering about so I put down the even money, the even amount.

Q. That was your personal residence?

A. Yes, in Chicago.

Q. There is an item below that "Furniture and fixtures from above". There is a loss reported of \$1,130.48? A. Yes.

Q. That is the furniture and fixtures that were kept at your apartment at 179 Lakeshore Drive?

A. What actually happened was that when we bought the apartment, Mrs. Fihe—and she will bear me out in this—we rebuilt the whole thing. We put in a new kitchen and we [73] carpeted the place and we bought that just about the time of this trouble which occurred with the partnership at Holly's—yes, it was about that time.

Well, after all that difficulty and after we had sold our stock in the company and also in view of the fact that I did have an established practice out here in California practising law and further, in view of the fact that my partner out here had just died suddenly, we decided to move to California, which we did, and we sold our summer home. We sold the apartment, and we took a loss on all the refurnishings and rebuilding that we had put into the apartment.

In fact, I think we took out one wall and made

(Testimony of Albert J. Fihe.)

another room somewhere. It was quite an expense, and I am sure it was more than \$1,100.00 which I showed as a loss but I wanted to be reasonable and consistent about it and we sold it for exactly the same thing as we paid for it, which is \$18,000.00.

Q. Now, when you sold your stock, patent rights and real estate to the corporation in 1948, do you recall who the escrow agent was on that transaction?

A. Can you read that question back, please?

Q. I will repeat it for you. When you sold your stock, and patent rights and real estate to the corporation in 1948, do you recall who the escrow agent was that handled the transaction?

A. Do you mean when Mrs. Fihe and I sold out—when we sold our—— [74]

Q. That is correct.

A. According to Petitioner's Exhibit No. 7?

Q. Well, I don't know what exhibit it is, but when you sold it was Attorney Trust Company and National Bank of Chicago the escrow agent?

A. Oh, that is what you are talking about. Oh, yes, yes, that is correct.

Q. Now, do you recall the patents which were covered under the Holly Molding machines?

A. Yes, I do.

Q. You testified that they were obtained in 1937?

A. The first one was applied for in 1936 and was granted in 1937. Then I obtained several more

(Testimony of Albert J. Fihe.)

patents on improved machines as they were invented by Holly Molding Devices.

Q. Who owned those patents?

A. The first patent was owned jointly by Harry Holly and myself, half interest to each. So far as I can remember the subsequent patents, when granted, were issued to us jointly.

If any were issued in 1945, they would then be assigned to the partnership consisting of Harry H. Holly and Agnes Holly, Elizabeth M. Fihe and myself. If any were issued in the latter part of 1947 or 1946—wait a minute [75] now, I am getting my dates mixed.

Will you read my answer back, please to make sure that I am right?

The Reporter: Yes, sir.

(Answer read.)

The Witness: May I make an insertion in that answer please, your Honor?

The Court: Yes.

The Witness: They were issued to us jointly in the same proportion.

And I will now finish my answer. They were issued to the corporation known as Holly Molding Devices, Inc., to the best of my recollection and there were at least four or five patents.

Q. (By Mr. Townsend): With respect to the patents that you sold to the corporation in 1948, when were they issued?

A. They were certainly issued before the time of the sale and at the time of sale of our stock, there

(Testimony of Albert J. Fihe.)

were some patent applications pending which applications were taken over by another firm of patent lawyers in Chicago. The county also revoked my power of attorneys.

Q. Were these original patents that you sold that were issued to you and Mr. Holly?

A. I sold my interest in them, yes, at the time we sold our stock. [76]

Q. Were those patents used by the partnership?

A. Yes, some of them and some of them did not turn out so well and did not work, so those patents are valueless.

Q. Did you receive anything from the partnership for the use of these patents?

A. That gets back to some of these book transactions which, as I testified, were made after Mrs. Fihe had sold out our interest. These auditors came into the offices of the company and had a very wonderful time.

The Court: Now, Mr. Fihe, that seems to me to be a little argumentative. If you can, stick to Mr. Townsend's questions.

The Witness: Will you read the question back, Miss Reporter, please?

The Reporter: Yes, sir.

(Question read.)

The Witness: Ostensibly according to the books as they now exist, yes. Actually no and may I explain that in just a little more detail, your Honor?

The Court: All right.

Mr. Townsend: Yes, please.

(Testimony of Albert J. Fihe.)

The Witness: After we had sold out, these auditors—I think their names were Barrow, Wade—and something. [77]

Q. (By Mr. Townsend): Certified public accountants? A. What?

Q. Certified public accountants?

A. Maybe they were. Barrow, Wade & Guthrie—that is their name—well, they got into the books in the offices of the company and performed some real unusual feats of bookkeeping wherein Mrs. Fihe and I were charged with sundry sums ranging from \$15.00 to \$5,000.00 or \$6,000.00 and after depositions taken in Chicago showing many of these sums have absolutely no explanation whatever—I remember particularly one item in the amount of \$10,600.00 and some odd dollars which I saw on the books, in the corporation's books when I was attending these depositions in Chicago about one month or so ago.

This was added at the bottom of my account page in pencil and I asked the witness whose handwriting is that. He said, “It is mine”.

I asked him why did he put that amount down at the bottom of my account page in the ledger as charged to me. His answer was “The auditors or the accountants told me to do it”. And that appears in those depositions.

The Court: Well, gentlemen, how much longer do you want to go tonight? It is now 5:00 o'clock.

Mr. Townsend: Well, your Honor, I do have a witness [78] to put on. Would it be possible to

(Testimony of Albert J. Fihe.)

continue this in the morning or later on in the week?

The Court: How long do you want?

Mr. Townsend: I would think possibly another hour, your Honor.

The Court: Well, you are in town?

The Witness: We will suit your Honor's convenience.

The Court: Is 9:00 o'clock too early?

The Witness: Tomorrow?

The Court: Yes.

The Witness: We will be here, your Honor.

The Court: All right, we will recess now and resume tomorrow morning at 9:00 o'clock.

(Witness excused.)

(Whereupon, at 5:05 p.m., Monday, November 28, 1955, the hearing in the above-entitled matter was adjourned until Tuesday, November 29, 1955, at 9:00 o'clock a.m.) [79]

Proceedings

The Clerk: The Court is in session.

Mr. Fihe: Shall I resume the stand, your Honor?

The Court: Please.

Whereupon,

ALBERT J. FIHE

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

The Court: I hope we will be finished before

(Testimony of Albert J. Fihe.)

10:30 today. I told the other people we were supposed to start at 10:00 but 10:30 will be all right.

The Witness: I am sure we can.

Q. (By Mr. Townsend): Mr. Fihe, are you familiar with Mr. Holly's signature? A. Yes.

Q. And is this Mr. Holly's signature on these notes which are under Exhibits Nos. 3 and 4?

A. 3, 4, 5, 6 and 10, yes, that is Harry H. Holly's signature underneath mine.

Q. Thank you.

A. Signing for Holly Molding Devices, a partnership.

May I interrupt just a moment, please? [82]

Q. Surely.

A. Just as we came into the court, I asked the reporter to check back on my last answer yesterday just before we closed and the answer related to an item of some \$10,600.00 which had been written in in pencil at the bottom of my ledger page on the books of the present corporation identified as Hollymatic Corporation.

I was explaining that in the depositions taken in Chicago on October 10th of this year, I had asked the witness about that entry and he had stated in the deposition that he was told to put that in in pencil by the auditors or accountants.

I do not believe I finished the answer and I wish to now state that I certainly did not receive that \$10,600.00 some odd dollars which was charged to my account and neither did Mrs. Fihe.

There was another point which I asked the re-

(Testimony of Albert J. Fihe.)

porter to check, but she was not able to find the portion before the Court went in session, and that is in relationship to the notes which Mrs. Fihe and I received when we sold our stock.

I am quite sure that I mentioned yesterday that those notes deliberately omitted the words "or order" and were not negotiable for that reason.

The Court: I remember that there was testimony to that effect, Mr. Fihe. [83]

Mr. Townsend: I think that would have been in his opening statement.

The Court: That could have been.

Mr. Townsend: The Respondent moves to strike the reference in the answer as to whether the notes were negotiable or not because it is a conclusion.

The Court: Are the notes in evidence?

The Witness: No, your Honor. They are paid and probably destroyed.

The Court: Well, the motion will be denied.

Q. (By Mr. Townsend): Mr. Fihe, I show you what has been marked as Respondent's Exhibit B for identification and ask you if that is your signature thereon? A. Yes.

(The document above-referred to was marked Respondent's Exhibit B for identification.)

Q. (By Mr. Townsend: I show you what has been marked as Respondent's Exhibit C for identification and ask if that is your signature thereon?

A. Yes.

(The document above-referred to was marked Respondent's Exhibit C for identification.)

(Testimony of Albert J. Fihe.)

Mr. Townsend: May I now have this document [84] marked for identification as Respondent's Exhibit D.

The Clerk: Exhibit D.

(The document above-referred to was marked Respondent's Exhibit D for identification.)

Q. (By Mr. Townsend): I show you Respondent's Exhibit D which has been marked for identification and ask you if that is your signature thereon? A. Yes.

Mr. Townsend: May I now have this document marked for identification as Respondent's Exhibit No. E?

The Clerk: Exhibit E.

(The document above-referred to was marked Respondent's Exhibit E for identification.)

Q. (By Mr. Townsend): I now show you Respondent's Exhibit E which has been marked for identification and ask you if that is your signature thereon? A. Yes.

Q. And Mrs. Fihe's signature?

A. Yes and hers also appears to Exhibit No. C.

Mr. Townsend: May I have this document marked for identification as Respondent's Exhibit F?

The Clerk: Exhibit F.

(The document above-referred to was marked Respondent's Exhibit F for identification.)

Q. (By Mr. Townsend): I now ask you, Mr. Fihe, if that is your signature on Respondent's Exhibit F marked for identification?

A. Is this F?

(Testimony of Albert J. Fihe.)

Q. Yes. A. Are you skipping one?

Q. I think we covered E.

A. Oh, no, this is Mrs. Fihe's signature.

Q. Well, take a look over on the other side.

A. Yes, it is mine on the left-hand side.

Mr. Townsend: May I now have this document marked for identification as Respondent's Exhibit G?

The Clerk: Exhibit G.

(The document above-referred to was marked Respondent's Exhibit G for identification.)

Q. (By Mr. Townsend): I now show you a document which has been marked for identification as Respondent's Exhibit G and ask you if that is your signature thereon? A. Yes.

Mr. Townsend: May I now have this document marked for identification as Respondent's Exhibit H?

The Clerk: Exhibit H.

(The document above-referred to was [86] marked Respondent's Exhibit H for identification.)

Q. (By Mr. Townsend): I show you now a document which has been marked for identification as Respondent's Exhibit H and ask you if that is Mr. Holly's signature thereon?

A. Yes, I recognize it.

Mr. Townsend: At this time, your Honor, Respondent offers in evidence what has been marked for identification as Respondent's Exhibit B, which

(Testimony of Albert J. Fihe.)

is the form 1040 individual income tax return for 1946 of Mr. Albert J. Fihe.

The Witness: No objection.

The Court: It may be received.

(The document heretofore marked Respondent's Exhibit B was received in evidence.)

The Witness: Will I have a copy of this, Mr. Townsend?

Mr. Townsend: Yes, I can give you a copy.

Respondent offers in evidence the document which has been marked Respondent's Exhibit C for identification, which is the form 1040 income tax, individual income tax return which has been admitted for 1946.

The Witness: No objection.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit C was received in evidence.)

Mr. Townsend: Respondent offers in evidence [87] the document which has been marked Respondent's Exhibit D for identification, which is the form 1040 individual income tax return for Albert J. Fihe and Elizabeth M. Fihe for the year 1947.

The Witness: No objection.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit D was received in evidence.)

Mr. Townsend: Respondent offers in evidence Exhibit—Respondent's Exhibit E which has been so marked for identification, which is the document

(Testimony of Albert J. Fihe.)

form 1040 individual income tax return of Albert J. Fihe and Elizabeth M. Fihe for 1948.

The Witness: No objection.

The Court: Admitted.

The Clerk: Exhibit E.

(The document heretofore marked Respondent's Exhibit E was received in evidence.)

Mr. Townsend: Respondent now offers in evidence Respondent's Exhibit F which has been been marked for identification, which is the form 1040 individual income tax return of Albert J. Fihe and Elizabeth M. Fihe.

The Witness: No objection.

The Court: Admitted.

The Clerk: Exhibit F. [88]

(The document heretofore marked Respondent's Exhibit F was received in evidence.)

Mr. Townsend: Respondent offers in evidence what has been marked for identification as Respondent's Exhibit G, which is the 1065 form, partnership return of income of the Holly Molding Devices for the year 1946.

The Witness: No objection.

The Court: Admitted.

The Clerk: Exhibit G.

(The document heretofore marked Respondent's Exhibit G was received in evidence.)

The Witness: May I look at that, please?

Mr. Townsend: All right.

The Witness: That is the one I signed.

Mr. Townsend: Respondent offers in evidence

(Testimony of Albert J. Fihe.)

as Respondent's Exhibit H the document marked for identification as Respondent's Exhibit H, which is a form 1065, partnership return of income admitted for 1946 of the Holly Molding Devices partnership.

The Witness: No objection.

The Court: Admitted.

The Clerk: Exhibit H.

(The document heretofore marked Respondent's Exhibit H was received in evidence.)

The Witness: And that is the one signed by Mr. Harry H. Holly. [89]

Mr. Townsend: That is correct.

The Witness: Would you like to look at the last page of that return, your Honor?

The Clerk: H was the last one.

Mr. Townsend: May I have this marked for identification as Respondent's Exhibit I?

(The document above-referred to was marked Respondent's Exhibit I for identification.)

Q. (By Mr. Townsend): I show you what has been marked for identification as Respondent's Exhibit I and ask you if that is Mr. Holly's signature?

A. Yes, I recognize that.

Q. You recognize that as Mr. Holly's signature?

A. Yes, I recognize the signature.

Mr. Townsend: It is offered in evidence as Respondent's Exhibit I, the document marked Respondent's Exhibit I for identification, which is a form 1120, a corporation income tax return for the

(Testimony of Albert J. Fihe.)

fiscal year ending September 30, 1947, of Holly Molding Devices, Inc.

The Witness: I have had no opportunity to study these, your Honor. We do not remember even having seen the original of this particular document before, but with the provision that I will receive a copy of that, so that I can look [90] at it, I have no objection.

The Court: Well, it will be in evidence and you will have a chance to look at it; it will be available to you, Mr. Fihe if you have occasion to seek them.

The Witness: Thank you, and there is no objection to the offer.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit I was received in evidence.)

Mr. Townsend: May I now have this document marked for identification as Respondent's Exhibit J?

(The document above-referred to was marked Respondent's Exhibit J for identification.)

Q. (By Mr. Townsend): I show you now Respondent's Exhibit J which has been marked for identification, which is a form 1120, corporation income tax return of the Holly Molding Devices for the fiscal year ended September 30, 1948.

A. Subject to the same provisions as before stated, I have no objection.

The Court: Admitted.

The Clerk: Respondent's Exhibit J.

(Testimony of Albert J. Fihe.)

(The document heretofore marked Respondent's Exhibit J was received in evidence.) [91]

Q. (By Mr. Townsend): Mr. Fihe, were your books ever checked by an internal revenue agent prior to the visit by Mr. Propeck in this particular case? A. Yes.

Q. When was that?

A. My books were checked in Chicago periodically, always annually and the same situation prevailed after we moved here to California.

Q. Do you remember a check being made by an agent in Chicago in 1941?

A. I presume the books were checked at that time; that is a long time ago, however.

Q. Did you ever—strike that.

Do you have your protest before you?

A. For 1941?

Q. No, your protest that you filed in this case?

A. Yes.

Q. Would you look at that, please?

A. Excuse me, your Honor, I will see if I can find it. Do you mean the protest for the purpose of this appeal?

Q. That is correct.

A. I have found one here dated 1946. Is that the one to which you have reference?

(No response.) [92]

The Witness: You have shown me a three page document entitled, "Protest against finding of Revenue Agent's Report" dated January 24, 1956. That is signed by me and notarized as of that date.

(Testimony of Albert J. Fihe.)

Q. (By Mr. Townsend): Have you read that, Mr. Fihe? A. Yes, I have.

Q. Particularly this part up here (indicating)?

A. Yes.

Q. Does that refresh your recollection about a check by an agent some time in 1940?

A. Yes, Mr. Propeck.

Q. This is in 1940, Mr. Fihe, in Chicago.

A. This document, in the second paragraph mentions Examining Officer John J. Propeck.

Q. What date?

A. Well, he made a report dated January 3, 1951.

Q. The part I am specifically referring to Mr. Fihe is on page 3—would you read that part right there (indicating)? A. All right.

Q. Will you read it into the record?

A. "I hereby state under oath that my books have been and always will be carefully kept especially since an original difficulty with one of your agents in 1940. This previous agent suggested that I maintained more accurate books [93] both in connection with my original practice of patent law and my business with which I might be associated collaterally."

Q. Thank you.

A. And may I add, your Honor, that I have here in California, my records of my business and I think those records start in 1940 and continue down to date. I did not offer that book because it

(Testimony of Albert J. Fihe.)

is too voluminous and it is something which I use almost daily.

Q. That statement contained in your protest is correct, about the agent advising you?

A. Yes, I was so advised. I believe I have fully complied with his suggestion.

Q. Now, these records that you have been speaking of, the records that you have here in Court, show receipts as determined from back deposits; is that correct, Mr. Fihe?

A. You are referring to our check stubs?

Q. I am referring to any of your records.

A. Yes, those records show moneys received over the years, both in the check stubs and the book which Mr. Propeck is now examining and which is a rather large, heavy book, having solid black back and cover with approximately three hundred or four hundred loose leaf pages in it. The pages are about 10" by 16".

Q. Well, Mr. Fihe, my question was, your receipts in your books and records—your checks and records, reflect [94] bank deposits; is that correct?

A. Yes, of course.

Q. So that if you received money that was not reflected in the bank, it isn't reflected in the records?

A. Any money that Mrs. Fihe and I received was deposited in the bank account.

Q. Are you sure of this?

A. I am positive.

Q. Everything you received?

(Testimony of Albert J. Fihe.)

A. Everything.

Q. Now, if you did not receive the cash itself, then there would be no entry in your receipts; is that correct, Mr. Fihe?

A. That is exactly the point I am trying to make. There are a lot of charges in the books of this Hollymatic Corporation against us, which we certainly did not receive, your Honor.

Q. Well, would you answer my question, Mr. Fihe?

If an item was not received in cash, it isn't reflected in receipts in your records; is that correct?

A. Will you read that question back, please?

The Reporter: Yes, sir.

(Question read.)

The Witness: There is a double negative there. I don't know what you are getting at but I can certainly answer [95] the question by saying that all money that was received was put into our bank account.

The Court: Have you reference to notes, Mr. Townsend?

Mr. Townsend: No, your Honor. For example, just a hypothetical case, if a debt was paid by someone else, his records would not reflect any receipt because of that debt being liquidated.

The Witness: I think there is one entry where the partnership, I think it paid an income tax for me in the amount of about \$600.00.

Q. (By Mr. Townsend): We were discussing that yesterday.

(Testimony of Albert J. Fihe.)

A. Yes, and that was charged to my account but I made a record of that in my check stub book and it is there and you saw it.

Q. That is correct. Now, other than that, Mr. Fihe, your records reflect cash received?

A. There was some cash, yes.

Q. On the tangibles, if you received notes, if you received property or cash, your records would reflect that; is that correct?

A. So far as I can remember we received no cash whatever from Holly Molding Devices. I did receive some cash payments from clients in connection with my patent practice [96] from time to time but they were very few and negligible. Practically all business these days, as you know, is done by check.

Q. But you are sure that everything you received went into your bank deposits?

A. Absolutely.

Q. Now, Mr. Fihe, I show you a letter dated March 7, 1952, to the United States Treasury Department and I ask you if you sent that letter?

A. Yes, my signature is on it.

Q. Would you please read, Mr. Fihe, the paragraph beginning on page 2 of that letter; would you read that into the record, please, Mr. Fihe?

A. Yes. "With regard to the purchase and sale of North West Airlines stock, I attach hereto a notice of purchase of the stock through Chapman—through Fardwell Chapman Co., of Chicago".

"The cost being \$2,501.60. There is also attached

(Testimony of Albert J. Fihe.)

a letter from the Bankers Trust Company of New York to the effect that the stock was sold on May 26, 1928; on that day the price of the stock was \$25½ bid, \$26 asked.

“Assuming that we sold it—and may I parenthetically state that it was a joint ownership of Mrs. Fihe and myself—assuming that she sold it at \$26 our profit would be approximately \$100.00 and I assume will be classified as a long term gain. [97]

“Very frankly, I can find no record of having received this money, and I am still trying to determine what happened to it. It is certainly not recorded as a deposit in any of our checking accounts, and no one seems to be able to tell me what happened to the check or by whom it was endorsed.”

Now, may I explain that to this Court? I have since discovered what happened to that one.

Mr. Townsend: In the interests of time, your Honor, I have no objection. If the Court feels it will save time, perhaps the redirect could go on from here?

The Court: I am sure it will.

Redirect Examination

The Witness: That stock was sold and I gave the check to the South East Bank in Chicago, to which bank we owed some money—I don't know how much it was—I have since discovered that that is what happened to that money.

At the time of writing that letter, I did not know what had happened to it.

(Testimony of Albert J. Fihe.)

Recross Examination

Q. (By Mr. Townsend): You were testifying yesterday with respect to the \$2,600.00 item, the legal fees, for Mr. Holly? A. Yes. [98]

Q. There is no check indicating any payment by you of that, is there?

A. No, that was charged to my account.

Q. When you say, "charged to your account", do you mean charged to your personal account or the corporation records; is that correct?

A. Yes, I am sure it is.

Q. That means that the corporation advanced the \$2,600.00 for you? A. Apparently right.

Q. And you deducted that \$2,600.00?

A. I deducted it in my account book here as an expenditure.

Q. Mr. Fihe, do your records reflect receipt of that \$2,600.00 item? A. Receipt of it?

Q. Yes.

A. The \$2,600.00 was paid out of the company funds to the attorney representing Mr. Holly at the time that he was indicted for this income tax evasion matter and it was charged to my account. I certainly haven't got the money. In fact, I spent the money. It is gone.

Q. Is it shown in your personal records?

A. Yes.

Q. Will you show me how it is shown in your [99] records—how it is reflected as a receipt?

A. It isn't reflected as a receipt. It is reflected

(Testimony of Albert J. Fihe.)

as an expenditure and I deducted it as an expenditure in my return for that year.

Q. Directing your attention to Exhibit 7, Mr. Fihe, which is a deed from the partners or a deed from Albert J. Fihe, Elizabeth M. Fihe, Harry H. Holly and Agnes Holly, to Edwin F. Zukowski—how did you happen to have the original of that deed?

A. There were two documents executed. This particular document was never notarized and it just happened to remain in my files. The original, of course, was delivered—the original notarized document.

Q. You made up two originals?

A. Yes, we may have signed three or four.

Q. Originals? A. It is possible.

Q. Now, are there buildings on that property?

A. Yes, there is a building on it.

Q. What is that land and building?

A. It is a twenty-five foot lot, and probably about one hundred feet deep. There was a frame building on it which we built ourselves and it adjoined the brick building which we also owned and in which we originally started the business. [100]

Q. So that this property was apart from the building and property in which the business was carried on?

A. It was connected and it adjoined it.

Q. Was that sold to Mr. Zukowski?

A. It was a mesne assignment whereby we transferred to Mr. Zukowski, who was one of our law-

(Testimony of Albert J. Fihe.)

yers there, and he transferred it to the corporation.

Q. What was the actual corporation—I mean what was the actual consideration received on that?

A. \$1.00, I think all the way around. It says \$10.00.

Q. What happened to the rest of the property?

A. It was all sold to the corporation at the time the partnership was dissolved and the corporation was organized.

Q. Which was at the same time as these?

A. Let me see the date—yes, that is correct.

Q. Well, how was the other property handled?

A. The stock was distributed.

Q. No, you mentioned the building.

A. Oh, the other real estate?

Q. Yes.

A. There were probably some deeds transferring the other real estate from the partnership, the four parties, to the corporation which I had just organized, but it just happens that I did not have any copies of those.

Q. Was that accomplished in the same fashion?

A. I don't think so. I think that was a direct transfer from the partnership to the corporation.

Q. Now, when did the partners acquire that property, Mr. Fihe?

A. We bought it probably in 1945.

Q. That was distributed to the partners by the partnership; is that correct, before the corporation was formed?

A. Yes, the four partners owned that real estate.

(Testimony of Albert J. Fihe.)

Q. Now, directing your attention to Respondent's Exhibit H and to Schedule D thereof, you will note the term, "Building cost \$11,991.32" with an asterisk at the bottom, distributed to the partners, September 30, 1936; is that the property that we are discussing?

A. That certainly must be, yes.

Q. And that is the property that was sold to the corporation when your stock and patent rights, et cetera, were sold?

A. That is right, I am sure. I believe, however, that for a little time the partners kept the real estate and we rented it to the corporation for some nominal sum, \$100.00 a month, or something like that.

Q. I see. Now, yesterday you also testified about the use of the patents that you and Mr. Holly owned, their use by the partnership; how about their use by the corporation; they were used by the [102] corporation, were they not, during the year 1947?

A. Yes, there was an attempt made at one time to work out a series of royalty payments whereby Mr. Holly and I, as joint owners of the partnership, would collect royalties from the corporation for the use of those patents, and we went so far as to draw up a royalty agreement. However, I doubt whether that royalty agreement was ever signed by either the corporation or ourselves.

Q. Wasn't there more than one such agreement?

A. Yes, we drew up two or three and nobody

(Testimony of Albert J. Fihe.)

seemed to like any of them and I doubt whether any of them were ever actually signed, as I say.

Q. Yesterday we also spoke about the sale of forty-nine shares or the purchase of forty-nine shares. I believe you could not ascertain just exactly what the proposition was. I believe you testified that it may be that you purchased those shares from Mrs. Fihe; do you recall that?

A. No, she sold them to me—no, I sold them to her. It was an inter-family transaction. I needed some money at the time. We were buying that cooperative apartment and I sold her my stock in Holly Molding Devices for \$4,900.00 and she gave me a check for it.

Later, she either bought it back or I gave it back to her because she had it when we sold out.

Q. I show you Respondent's Exhibit D, which is your individual income tax return for 1947, and direct your attention to the schedule D thereon, particularly long term capital gains. A. Yes.

Q. What does that read, Mr. Fihe?

A. It says, "Sold" and what it cost me. It says, "Referring to Holly Molding Devices, forty-nine shares". That helps to explain that particular inter-family transaction.

Q. You did not report any gain or loss on that?

A. No, there wasn't any.

Q. Now, when you received these notes from the corporation for the sale of your interest in 1948, you also received a chattel mortgage securing these notes, did you not? A. Yes, we did.

(Testimony of Albert J. Fihe.)

Q. And that covered all machinery and equipment of the corporation?

A. Yes, but it certainly wasn't anything like the \$70,000.00 face value of the notes. They did not have that much machinery in the place.

Q. When did you commence your law practice in Los Angeles?

A. I have had an office in Los Angeles for thirty years.

Q. For thirty years? A. Yes. [104]

Q. And how about Chicago?

A. I had an office in Chicago for thirty-four years—well, it isn't there any more now—but I started out in 1921.

Q. Now, to get back to that building and land or the two buildings and land, real estate, that you owned as partners and sold to the corporation. Was that property encumbered by a mortgage at any time?

A. There may have been a mortgage on it when the partnership bought it, but we bought it, I think, for cash. We may have borrowed some money from the bank to help us buy it and we probably owed the bank some money, but I don't think there was a mortgage on the property when we owned it.

Q. Well, you still owed the bank some money on it at the end of the partnership in September, 1947?

A. Yes, we always owed the bank money.

Q. How about your patents which you sold to the corporation and your stock; were they encum-

(Testimony of Albert J. Fihe.)

bered in any way by means of a chattel mortgage or otherwise? A. No.

Q. You did not borrow any money on it?

A. No, we did not borrow any money on the corporation stock.

Q. I mean your personal holdings.

A. No, we could not. I tried to, but the bank [105] would not let us have anything.

Q. When you sold that property to the corporation in 1948, that is the real estate buildings and land, was there still a mortgage on it?

A. On the property sold in 1946?

Q. Was it sold to the corporation in 1946?

A. Yes.

Q. Your deed is dated 1948 there.

A. 1946, Petitioner's Exhibit No. 7.

Q. Well, when was the remainder of the property sold—do you remember you had an adjoining building?

A. An adjoining lot to this property?

Q. Yes, an adjoining lot to this property mentioned in your deed, Exhibit No. 7, was that the property that you sold in 1948 to the corporation?

A. No, this was the lot on which we had the frame additional and we bought that as of 1946. Now, the partnership kept the brick building for a time after the corporation was organized. I think the partnership retained the title and the partners did collect some rent for that for some time. That rent was paid to us by the corporation.

(Testimony of Albert J. Fihe.)

Q. And that was the property that you sold in 1948 to the corporation?

A. That was sold when we sold out everything. That was part of the \$100,000.00 transaction. [106]

Q. Was that specific property encumbered by a mortgage when you sold it to the corporation?

A. Not that I know of.

Q. Now, when you moved out here from Chicago in 1948, I believe you moved your family to a hotel; is that correct, Mr. Fihe?

A. Yes.

Q. What hotel was that?

A. The Miramar.

Q. Now, you deducted the hotel bill as a travel expense in your return, did you not?

A. Yes.

Q. Now, on what basis do you think you could deduct the cost of new suits as advertising expenses?

A. If I do not look pretty prosperous, I do not get the patent business.

Q. But you did deduct them as advertising expenses?

A. Yes, I think it is perfectly good advertising and the only way a lawyer can advertise.

Q. How about the deduction of your automobile expenses, Mr. Fihe?

A. I use a car in my business daily. In addition to going to and from work and this condition prevailed in Chicago and also here. My clients are scattered over a wide territory. Very few clients come to see me. They usually [107] have a large

(Testimony of Albert J. Fihe.)

machine or some equipment on which they want a patent and I have to go and see that.

They also usually have a number of engineers, officers of the corporation, or the owners of the business, who want to all be present when the device is examined by me. Therefore, I do a great deal of traveling around locally and also nationally, in connection with my patent work.

Q. Now, Mr. Fihe, I show you Respondent's Exhibit No. 7, which is your individual income tax return for 1949 and you were testifying respecting the deductions on that return yesterday.

A. Yes.

Q. Will you turn to page 3 of that return, please? A. Yes.

Q. There is a deduction there for interest in the amount of \$3,909.95.

A. Yes, I explained that yesterday.

Q. Just a minute; you have an item on there for interest in the amount of \$3,909.95?

A. Yes.

Q. Now, turning to page 2 thereof, under schedule C, profit or loss from business, on line 13 interest on business indebtedness; what is the figure there? A. The same amount, \$3,909.95.

Q. Is that the same deduction? [108]

A. I deducted that twice.

Q. Now, turning back to page 3, another item, taxes, what is the amount there, please?

A. \$3,511.44.

Q. Turning back to page 2 schedule C line 14,

(Testimony of Albert J. Fihe.)

taxes on business or business property, what is the amount there, please? A. The same amount.

Q. Is that deducted twice? A. Yes.

Q. Now, on the sale of your property to the corporation in 1948, you previously received in December, 1947, a payment of \$1,000.00 from the corporation on the option, did you not?

A. That was an escrow or option check.

Q. You received that \$1,000.00? A. Yes.

Q. And the next month you received \$24,000.00 as a check? A. That is correct.

Q. Were you in charge of the partnership books of the Holly Molding Devices partnership?

A. Yes.

Q. Were you also in charge of making up the returns, Mr. Fihe? A. Yes. [109]

Q. Were you in charge of the corporation books in 1947? A. Yes.

Q. Were you still in the business in June of the year 1947?

A. Yes, I was president of the corporation.

Q. And you were in the office regularly about that time? A. Every day.

Q. Are you familiar with the certified public accounting firm of Barrow, Wade & Guthrie, at that time? A. Yes, I employed them.

Q. They came to the business and worked there at your specific request, is that right? A. Yes.

Q. And they were there when you were there?

A. Oh, yes.

(Testimony of Albert J. Fihe.)

Q. Now, how did you acquire your half interest in the patents of that venture of Mr. Holly's?

A. That was the original agreement which he and I made back in 1936.

Q. Did you perform the service in getting the patent for him? A. Yes. [110]

Q. In getting his inventions patented?

A. Yes.

Q. And for those services you received a half interest in the patents? A. That is correct.

Q. Now, in relation to acquiring that patent, when was the partnership formed?

A. The original partnership consisted of Mr. Holly and me and we owned equal shares.

Q. I mean, did you form the partnership immediately upon receiving the patent title or before that?

A. We formed the partnership immediately on applying for the patent in 1946.

Q. Did you have authority to draw checks on the partnership?

A. The checks were all countersigned.

Q. Countersigned by whom?

A. In the beginning Harry Holly and I both. When the four party partnership was organized, our understanding and agreement was, and our instructions to the bank was that there had to be one of the Hollys sign and one of the Fihe's sign every check, and that they would not receive or pay a check signed by say either both Hollys or by both Fihe's.

(Testimony of Albert J. Fihe.)

Q. Did you draw checks in conformance with those by-laws? [111] A. Oh, of course.

Q. How about the corporation; did you have authority to draw checks on the corporation?

A. Not by myself, they had always to be countersigned by one of the Hollys.

Q. Did you draw checks so countersigned?

A. Oh, yes, and when Mrs. Fihe drew a check, it was countersigned by one of the Hollys.

Q. Now, yesterday we were talking about furniture that you sold to the corporation? A. Yes.

Q. In December, 1948. A. Yes.

Q. Do you recall that? A. Yes.

Q. What type of furniture was that?

A. There is a list here and I think the bill of sale is in evidence.

Q. Well, was that personal furniture or——

A. It was my office furniture which I had brought out to the offices of the corporation from my down town loop office in Chicago.

There are two items which could not properly be classified as "office furniture". Namely, one ping-pong table and one Kelvinator refrigerator, but that material had [112] been brought out—those two items had been brought out from my home to the offices of the company and they were being used out there.

Q. Directing your attention to Respondent's Exhibit D, your income tax return for the year 1947, and specifically to schedule F, the deduction for

(Testimony of Albert J. Fihe.)

depreciation for 1947, there is an item office furniture in which you deducted depreciation of \$64.9.

A. Yes.

Q. Is that the same furniture?

A. It probably is, I think, with the exception of the refrigerator and the ping-pong table.

Mr. Townsend: That is all, your Honor.

The Court: Thank you, Mr. Fihe.

Mr. Fihe: Thank you, sir.

(Witness excused.)

Mr. Fihe: If the Court please, that closes the Petitioners' case.

The Court: Thank you, sir.

Mr. Townsend: Do you rest, Mr. Fihe?

Mr. Fihe: I rest.

Mr. Townsend: At this time, your Honor, the Respondent offers in evidence, the direct testimony, the redirect testimony and the objections to the cross examination in the deposition of Mr. Frank H. Wiscons, taken pursuant to [113] the order of this Court on October 10, 1955, in Chicago, Illinois.

Mr. Fihe: No objection.

The Court: It will be admitted.

Mr. Townsend: And I believe the Court has a copy of this deposition.

The Court: There is a copy in the docket.

Mr. Townsend: Mr. Propeck, will you take the stand?

The Clerk: Will you tell us your name, Mr. Witness?

Mr. Propeck: John J. Propeck.

Whereupon,

JOHN J. PROPECK

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Townsend): Will you state your name, please? A. John J. Propeck.

Q. By whom are you employed?

A. Internal Revenue Service.

Q. How long have you been so employed?

A. Ten years on the 28th of March of next year.

Q. What is your position with the Internal Revenue? [114]

A. GS11, Internal Revenue agent.

Q. Internal Revenue agent? A. Yes.

Q. And you have been an Internal Revenue agent for ten years? A. Yes, sir.

Q. What is your actual background in accounting, Mr. Propeck?

A. I was graduated from the University of Notre Dame in 1941, when I majored in accounting and since that time I have completed some post-graduate courses at the University of California, Los Angeles, and have the certificate of certified public accountant in the State of California.

Q. Does your work as an Internal Revenue agent constantly expose you to accounting work?

A. Yes, sir.

Q. Now, at my request, Mr. Propeck, did you prepare certain documents on the basis of deposi-

(Testimony of John J. Propeck.)

tions which were taken on October 10, 1955, in Chicago? A. I did.

Mr. Townsend: May I have this marked for identification as Respondent's Exhibit K?

The Clerk: Exhibit K for identification.

(The document above-referred to was marked Respondent's Exhibit K for identification.)

Mr. Townsend: May I also have this document marked for identification as Respondent's Exhibit L?

The Clerk: Exhibit L.

(The document above-referred to was marked Respondent's Exhibit L for identification.)

Mr. Fihe: Which one is L?

Mr. Townsend: This one (indicating).

Mr. Fihe: Oh, thank you.

Q. (By Mr. Townsend): I show you what has been marked for identification as Respondent's Exhibit K, and ask you to state what that is.

A. Exhibit K is a schedule of reconstruction of personal account from Hollymatic books of account based on the deposition taken in Chicago on October 10, 1955.

Mr. Townsend: Respondent offers in evidence as Respondent's Exhibit K, the document which has just been identified by the witness.

Mr. Fihe: If the Court please, I have not had an opportunity to check this thing in detail. It is quite voluminous, but I have no objection to the document provided I can reserve the privilege to

(Testimony of John J. Propeck.)

comment upon any discrepancies or whatever else I may find therein.

The Court: The document, after it is introduced into evidence, Mr. Fihe, you will have the privilege of [116] withdrawing any of these exhibits for use in briefing or for comparity purposes and you can then argue from them.

Mr. Fihe: Mr. Townsend has kindly furnished me with a copy.

Mr. Townsend: I may point out, your Honor, that the primary reason for preparing this exhibit is to put into book form the deposition.

The Court: All right, admitted.

The Clerk: Exhibit K.

(The document heretofore marked Respondent's Exhibit K, was received in evidence.)

Q. (By Mr. Townsend): I now show you what has been marked as Respondent's Exhibit L for identification and I will ask you to state what that is.

A. Exhibit L is also a schedule of reconstruction of personal account from Hollymatic books of account based upon the deposition taken on October 10, 1955, in Chicago, Illinois.

Mr. Townsend: Respondent offers in evidence Respondent's Exhibit L which has been marked for identification by the Clerk, and which exhibit has been identified by the witness.

Mr. Fihe: Subject to the same objection—I mean reservation, there is no objection.

The Court: Admitted. [117]

(Testimony of John J. Propeck.)

The Clerk: Exhibit L.

(The document heretofore marked Respondent's Exhibit L was received in evidence.)

Mr. Townsend: May I now have this document marked for identification as Respondent's Exhibit M?

The Clerk: Exhibit M.

(The document above-referred to was marked Respondent's Exhibit M for identification.)

Mr. Fihe: What is it?

Mr. Townsend: Exhibit M—I will have the witness describe it.

Q. (By Mr. Townsend): I now show you what has been marked for identification as Respondent's Exhibit M and ask you to tell us what it is?

A. Exhibit M consists of a transcript from the deposition taken on October 10, 1955, at Chicago, Illinois, and actually represents two journal entries reflecting the salary paid to Mr. Fihe, and also a journal entry to accrue the salary due Mr. Fihe at April 30, 1947.

Mr. Townsend: I now offer Respondent's Exhibit M marked for identification in evidence.

Mr. Fihe: Subject to the same reservations, no objection.

The Court: Admitted. [118]

(The document heretofore marked Respondent's Exhibit M was received in evidence.)

Q. (By Mr. Townsend): Now, Mr. Propeck, directing your attention to Respondent's Exhibit M and to Respondent's Exhibit K, would you please

(Testimony of John J. Propeck.)

key Respondent's Exhibit M into Respondent's Exhibit K, and I believe that only applies to the second entry on that sheet?

A. That is right. In regard to Respondent's Exhibit M the \$10,706.20 credit to Albert J. Fihe's personal account arose from a journal entry which accrued from salaries in a total amount of \$23,840.00, \$10,706.20 of which was credited to Mr. Fihe's personal account as shown on the right hand side of Respondent's Exhibit K and enumerated or entered at April 30, 1947, as a journal entry.

The notes as taken from the deposition, indicate that there was accrued salary for the seven months for the period of April 30, 1947, which wasn't paid at the time it was accrued on Hollymatic Corporation's books.

Q. Now, Mr. Propeck, you have heard Mr. Fihe testify yesterday with respect to his disallowed deductions to the effect that the deductions were entirely disallowed. Take, for example, the year 1948, and very briefly run through some of the disallowances of expenses, showing what was paid and what was disallowed. [119]

A. In the year 1948, the taxpayer claimed interest in the amount of \$3,111.84. \$2,876.44 of that amount was allowed and \$235.40 was disallowed.

In the same year, travel expenses were claimed in the amount of \$8,679.14. They were allowed in the amount of \$2,876.17 and an aggregate of \$5,892.97 were disallowed.

The Court: Those items you are testifying to,

(Testimony of John J. Propeck.)

Mr. Propeck, aren't they set out in the deficiency notice?

The Witness: Yes, sir.

Mr. Townsend: The notice of deficiency doesn't show what was claimed and what was allowed or disallowed. You have to have the key from the ninety day letter.

The Court: All right.

Mr. Townsend: Maybe we can shorten that.

Q. (By Mr. Townsend): Mr. Propeck, is that true with respect to almost all of the items claimed for, that there were substantial amounts which were allowed?

A. Yes, sir. Out of thirteen items that had adjustments made to them, only one was disallowed in toto.

Mr. Fihe: May we object to the question and answer, your Honor, particularly to the word "substantial" in the question?

The witness has just testified that in the item of travel expenses where I claimed an expenditure of some [120] \$6,000.00, they disallowed \$5,800.00 of it.

The Court: The use of the word "substantial" means something different to everyone. It is an adjective.

Q. (By Mr. Townsend): Mr. Propeck, did you work on this particular case that we have here before the Court today?

A. Yes, sir, I did.

Q. In what connection?

A. I commenced an audit back in 1950 for the

(Testimony of John J. Propeck.)

years 1947, 1948 and 1949 for both Alfred J. Fihe and Elizabeth M. Fihe.

Q. You heard Mr. Fihe testify yesterday with respect to a casualty loss which he claimed in 1948 of \$2,300.04; what did you find that amount represented?

A. I found that on examination of the check book stubs that Mr. Fihe presented at the time, that the \$2,300.04 consisted of two items, namely, \$2,086.04 which was claimed as a casualty loss and represented the personal loss of furniture he had shipped from Chicago to Los Angeles, which had been damaged en route.

And he measured this cost of purchasing—the purchase of furniture in Los Angeles, and the record shows it represented the cost of purchasing new furniture.

The remaining \$214.00 represented, according to the taxpayer's records, cash from a stolen wallet.

Q. Now, Mr. Propeck, in determining the basis, the taxpayer's basis in the stock, patent rights and properties which he sold to the corporation, the Commissioner determined roughly \$20,000.00 was the basis.

Could you please explain how that figure was arrived at?

A. May I have that question read, please?

The Reporter: Yes, sir.

(Question read.)

The Witness: On Respondent's Exhibit H, page 4, there was a balance sheet for Holly Molding De-

(Testimony of John J. Propeck.)

vices for its short period ending September 30, 1946, and in schedule I, on page 4 of that return, are the—I beg your pardon—schedule H of that return, are the capital accounts of Harry H. Holly, Agnes Holly, Albert J. Fihe and Elizabeth M. Fihe, in the amount of \$8,174.57 each.

The \$16,349.14 represented the investment to Alfred J. Fihe and Elizabeth M. Fihe at September 30, 1946 immediately before these capital accounts were transferred to the books of the corporation.

Based upon the accounting transaction involved, it would appear that Mr. and Mrs. Fihe received stock in the amount of the capital account balances that they had at the time the partnership was dissolved.

Q. How about the land and buildings; the basis for [122] that, Mr. Propeck?

A. In Respondent's Exhibit H, counsel doesn't show the land and buildings. I believe that is on a previous sheet—oh, I beg your pardon—in schedule D of page 2 of the return, there were \$11,991.32 in buildings which were distributed to the partners at this same date, 9-30-46. They were apparently held individually at that date—after that date.

Q. Now, Mr. Propeck, to go back to your schedule H on Exhibit H, we find a total amount of capital accounts showing \$32,698.28; is that correct?

A. Yes.

Q. How was that handled so far as the corporation was concerned?

A. At the time the corporation was organized,

(Testimony of John J. Propeck.)

I believe that it was in—the deposition shows that there was \$20,000.00 in capital stock authorizations which had been subscribed to by the Fihe and the Hollys and that the remaining \$12,698.28 out of the total of \$32,698.28 was treated as a credit on the corporation books.

Q. So that your determination basis then was the land as shown in the return reduced by depreciation, which had been taken, plus the sum of the capital accounts?

A. Land and buildings you mean?

Q. Yes, is that correct? [123]

A. Yes, that is correct. However, it would appear to me that the \$11,000.00 for the buildings and the land cost were excluded from the corporation at the time of incorporation and all your remaining \$32,698.28 was transferred to the corporation books.

Q. At that time——

A. The Fihe and the Hollys held the land and buildings themselves.

Q. That is correct but they sold that land in 1948.

A. Back to the corporation.

Q. That is right. Now, were all the liabilities owed to Mr. and Mrs. Fihe by the partnership assumed by the corporation?

A. Yes, sir.

The Court: That is according to the corporation's books?

The Witness: Yes, and I think that Mr. Fihe testified to that yesterday.

Q. (By Mr. Townsend): Now, Mr. Propeck,

(Testimony of John J. Propeck.)

you recommended the assertion of the negligence penalty in this case; what was your basis?

A. Well, I would say the primary reason for having recommended the negligence penalty originally was the fact that the taxpayer had deducted withholding taxes which the Government had withheld at source on page 3 of his income tax [124] return.

Secondly, we found upon audit that there were duplication of items. Where there were two portions for the items to go on the return, the taxpayer had claimed them in two instances on two separate spots on the return.

Thirdly, at the time the audit took place, Mr. Fihe did not have any records available, other than those check book stubs that were referred to yesterday in the testimony.

Q. You have examined those check stubs?

A. I did examine those check book stubs in 1950 and subsequently this case, at Mr. Fihe's request, was transferred to the Chicago Division and I would like to point out to the Court that Mr. Fihe mentioned in his testimony yesterday that he spent a solid week with the Internal Revenue agent involved and the ninety day letter for the case was prepared in this office, based solely upon the recommendations of the Chicago Division, indicating that the Chicago Division still thought that the negligence penalty should be asserted.

Q. Did the Chicago Division have a detailed audit of Mr. Fihe's records? A. Yes, sir.

(Testimony of John J. Propeck.)

Q. They prepared a report in the Chicago Division, did they?

A. Yes, and transferred it to Los Angeles.

Mr. Townsend: No further questions, your Honor.

Mr. Fihe: Just about three questions on cross [125] examination, if the Court please.

Cross Examination

Q. (By Mr. Fihe): You have just testified, Mr. Propeck, that the information regarding which you have before you was mainly received from the Chicago office, is that right?

A. It is stated that the ninety day letter was based on an audit performed in the Chicago office.

Q. And then may we assume that the records of Hollymatic Corporation, the successor to the corporation to whom Mrs. Fihe and I sold out, were the basis of that Chicago report?

A. I cannot recall from memory, Mr. Fihe when the name was legally changed from Holly Molding Devices to Hollymatic Corporation without reverting here to the deposition taken.

Q. Well, that isn't necessary.

A. I would state though that the ninety day letter that was prepared was based solely on a report apparently devised from the books of Holly Molding Devices instead of the Hollymatic Corporation.

Q. Will you refer to Exhibits K and L just before you right now? A. Yes.

Q. Isn't it a fact that that—strike that. Isn't it

(Testimony of John J. Propeck.)

[126] a fact that they stated that those are taken from the records of the Hollymatic Corporation?

A. Yes, sir, they do.

Q. Do you know or do you not know whether these were reconstructed records made after Mrs. Fihe and I had sold our interest?

A. I don't know of my own knowledge, but from reading the deposition.

Q. What is the second line of both Exhibits K and L, Mr. Propeck?

A. I am sorry, mine are not marked. Is the K for you and the L for your wife?

Q. That is correct.

A. And you want the debit or the credit side?

Q. No, just read the title under our names.

A. "Schedule of reconstruction of personal accounts from Hollymatic books of account, based upon deposition taken on October 10, 1955, at Chicago, Illinois."

Q. Now, do you know or do you not know that after we had sold out our interests, Holly Molding Devices or Hollymatic employed these auditors or accountants to go back over the books of the corporation for the years 1946, 1947 and possibly 1945 and work up this schedule referring to Exhibits K and L?

A. Do I know that of my own knowledge? [127]

Q. Yes, do you?

A. I don't know that of my own knowledge.

Q. You have testified that when the corporation

(Testimony of John J. Propeck.)

was organized, there were some actual transferable assets of \$20,000.00 represented by two hundred shares of common stock, \$100.00 par value, and that there was an excess or surplus of about \$2,000.00; doesn't that pretty nearly represent the figure of \$35,000.00 that Mrs. Fihe and I have testified we put into that company?

A. No, sir, not taking the whole amount — you are taking the whole amount, the total amount. Mrs. Fihe and you put about \$16,000.00 into it only.

Q. You heard the testimony here that we were the only ones who put money into the business?

A. Yes, I heard the testimony, yes, sir.

Mr. Fihe: That is all. Thank you.

Mr. Townsend: One more question, Mr. Propeck.

Redirect Examination

Q. (By Mr. Townsend): Are you familiar with audits that have been made from your personal experience by accounting firms? A. Yes, sir.

Q. Have you ever known of an accounting firm to go to the books and any correcting entries that they might make, to date these correcting entries back several years? [128]

(No response.)

Q. For example, they can perform an audit depending on the type of engagement for the specific years the client decides upon? A. Correct.

Q. For example, they might make an audit for the year 1955 and the client might say, "I am not certain of my records back in 1950, 1951, 1952 and

(Testimony of John J. Propeck.)

1953," and they would actually make an audit for the years that the client so specified.

But any entries that they might make to correct the income or the balance sheet as reflected by the company, originally back in those years, they would make solely to one account, because the books would have been completely closed?

A. They would not be entered on the various books.

Q. They would not be entered individually in any one of the accounts. They would show that in the general journal by making adjusting entries, showing income or loss which would be reflected in the earnings account, and they would not be entered as original entries?

A. No, sir, they would appear as auditor's adjustment—auditor's adjusting entries.

Mr. Townsend: No further questions.

Mr. Fihe: There are no further questions. Thank you very much, Mr. Propeck. [129]

The Court: Witness excused.

(Witness excused.)

Mr. Fihe: May I interject at this time one statement?

Mr. Townsend: Are you testifying as a witness, Mr. Fihe?

Mr. Fihe: Yes.

Whereupon,

ALBERT J. FIHE

recalled as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

The Witness: I would like to refer to Petitioner's Exhibit 7 and I wish to state here that I know of my own personal knowledge that while this document is dated October 1, 1946, it was actually not executed until some time in either the latter part of 1947 or the first part of 1948, and that was part of the reconstruction of these records.

And the transfer of some of this real estate which took place after all this trouble with the attempted perjury of the agent and in order to get some of this real estate straightened out, the four of us dated back this real estate transfer.

That is merely in rebuttal of Mr. Propeck's [130] statement, that they do not date these records back. I know for a fact that this one was.

That is all.

(Witness excused.)

Mr. Fihe: That probably closes the case. Does your Honor want briefs on these things?

Mr. Townsend: Your Honor, I have one point—if you recall in my opening statement, I made the point that the ninety day letter sets up as income received from the corporation in 1947, items classi-

fied as dividends, items classified as royalties—it is rather difficult to determine just exactly what they are.

It appears from the proof that some of it represents salary. However, there is an under-statement of income. Respondent would like to amend his pleadings, if that is necessary, to make that a lump sum as understated income without classifying the various items, if the Court feels that is necessary.

The Court: Well, I hesitate to advise the parties.

Mr. Townsend: May I have leave to amend them and to do that, your Honor?

The Court: Do you have your amendment *read*, Mr. Townsend?

Mr. Townsend: No, I am sorry I do not.

The Court: Well, I am afraid I will have to deny [131] you leave to do that.

Mr. Townsend: Very well then, your Honor.

The Court: I will ask for briefs in **sixty days** with twenty days thereafter to reply, if you want to.

Mr. Fihe: Shall we exchange briefs at the end of the sixty days?

The Court: If you file them with the Court, the Court will serve them on the other parties. And I would request that you be careful in setting out your proposed findings and facts.

Mr. Fihe: You want these with the briefs?

The Court: Yes, the rules provide for that.

Mr. Fihe: And may I, on behalf of myself and Mrs. Fihe, thank you very much for your very kind attention.

The Court: You are welcome.

(Whereupon, at 10:25 o'clock a.m., Tuesday, November 29, 1955, the hearing in the above-entitled matter was closed.) [132]

[Endorsed]: T.C.U.S. Filed December 12, 1955.

[Endorsed]: No. 15726. United States Court of Appeals for the Ninth Circuit. Albert J. Fihe and Elizabeth Fihe, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: September 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

3. The Tax Court erred in taking into consideration the fact that the then president of Holly Molding Devices, Inc., namely Harry H. Holly, was an ex-convict, having served a term in the federal penitentiary for attempted income tax evasion and also for actual bribing of an internal revenue agent. The statements and records of such a person should not be given precedence or preference over the word of a reputable attorney, sworn to uphold the Constitution, and especially as he actually reported Holly's wrongdoings to the Federal Bureau of Investigation and the Internal Revenue Department.

4. The Judge of the Tax Court erred in holding that the Petitioners did not invest at least \$35,000.00 to \$50,000.00 in the corporation's predecessor partnership known as Holly Molding Devices during the ten years of 1936 to 1945, inclusive, and in ruling that the Petitioners realized a long term capital gain of about \$80,000.00 when selling their stock in the corporation in 1948. Petitioners' profit was not over \$50,000.00, and was distributed over several years.

5. The Judge erred in assessing a negligence penalty against the Petitioners for each of the years 1946, 1947 and 1948, regardless of the fact that Petitioners' 1946 return was prepared by a firm of certified public accountants and regardless of the fact that Petitioners at the trial submitted books of record showing careful and individual entries for all their business transactions for the years 1947, 1948 and 1949, which corresponded with their returns for those years.

6. The Tax Court erred in ruling that the non-negotiable notes which Petitioners received when selling their stock in the corporation represented actual cash and taxed Petitioners accordingly. Payments on these notes extended over a period of more than three years, and taxes should accordingly have been so distributed. The Court erred in taxing the Petitioners on the entire sum in the year 1948, although payments were never assured and could not have been collected by Petitioners under any circumstances in the one year 1948.

7. The Court erred in determining a tax deficiency against the Petitioners of approximately \$7,000.00 for the year 1948, when, in fact, Petitioners experienced and reported a business loss of over \$20,000.00 in the year 1950, which should be applied as a carry-back to the year 1948. Petitioners' profits for 1948 were not substantial in any event.

8. The Judge erred in not recognizing the proven fact that Petitioners saved the United States Government untold sums of money in reporting the wrong-doings and fraudulent actions of Harry H. Holly, his company auditor and the Internal Revenue agent conspiring with them. The honesty and integrity of the Petitioners have been proven to be above reproach and any reasonable doubt should be resolved in Petitioners' favor.

A copy of this statement of points has today been mailed to Charles K. Rice, Esq., Assistant Attorney General, Tax Division, United States Department

of Justice, Washington 25, D. C., and another copy has been mailed to Nelson P. Rose, Chief Counsel, Internal Revenue Service, Washington 25, D. C.

Respectfully submitted,

October 9, 1957.

/s/ ALBERT J. FIHE,
Attorney for Petitioners-
Appellants.

[Endorsed]: Filed October 10, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON REVIEW

Honorable Paul P. O'Brien, Clerk, United States Court of Appeals for the Ninth Circuit, San Francisco, California, Sir:

In accordance with Rule 17 (6), Petitioners herein submit a designation of all of the record which is believed to be material to the consideration of this appeal as follows:

1. Petitioners' Exhibits 2 to 12, inclusive, and Respondent's Exhibits A to M, inclusive.
2. Individual income tax return of Elizabeth M. Fihe for the year 1946.
3. Letter from the office of the Regional Commissioner directed to Albert J. Fihe, dated Janu-

ary 14, 1954, advising determination of income tax liability for the year 1946.

4. Letter from the office of the Regional Commissioner directed to Albert J. and Elizabeth M. Fihe, dated January 14, 1954, advising determination of income tax liabilities for the years 1947, 1948 and 1949.

5. Petition filed by Albert J. Fihe in the Tax Court of the United States for redetermination of the tax deficiency for the year 1946.

6. Petition filed by Albert J. and Elizabeth M. Fihe in the Tax Court of the United States for redetermination of the tax deficiency for the years 1947, 1948, and 1949.

7. Answer filed by Commissioner of Internal Revenue to petition of Albert J. Fihe for redetermination of 1946 tax.

8. Answer filed by Commissioner of Internal Revenue to petition of Albert J. and Elizabeth M. Fihe for redetermination of 1947, 1948 and 1949 taxes.

9. Amendment to above answer.

10. Deposition of Frank H. Wiscons taken in Chicago on October 10, 1955.

11. Report of proceedings before the Tax Court of the United States in Los Angeles on November 28, and 29, 1955.

12. Computation for entry of decision filed by Respondent in Docket No. 52,394.

13. Computation for entry of decision filed by Respondent in Docket No. 52,396.

14. Petitioners' proposed findings in Dockets Nos. 52,394 and 52,396.

15. Petitioners' comments on computations submitted.

16. Motions filed by Petitioners, dated May 9, 1957.

17. Petition for rehearing, filed June 13, 1957.

18. Memorandum findings of fact and opinion.

19. Decision, Docket No. 52,394.

20. Decision, Docket No. 52,396.

21. Notice of filing of petition for review.

22. Petition for review.

23. Designation of contents of Record on Review.

A copy of this Designation of Contents of Record on Review has today been mailed to Charles K. Rice, Assistant Attorney General, Tax Division, United States Department of Justice, Washington 25, D. C.; and another copy has today been mailed to Nelson P. Rose, Chief Counsel, Internal Revenue Service, Washington 25, D. C.

Respectfully submitted,

Burbank, California, October 9, 1957.

/s/ ALBERT J. FIHE,

Counsel for Petitioners.

[Endorsed]: Filed Oct. 10, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION TO CONSIDER EXHIBITS
IN ORIGINAL FORM

To the Honorable Court:

It is hereby stipulated by counsel for the respective parties that, subject to the approval of this Court, that the exhibits be considered in their original form without the necessity of reproduction in the printed record.

Burbank, California, January 29, 1958.

/s/ ALBERT J. FIHE,
Attorney for Petitioners.

Washington, D. C., February 10, 1958.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for Respondent.

[Endorsed]: Filed February 12, 1958. Paul P. O'Brien, Clerk.